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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

MARVIN L. WARNER,

Petitioner,

v.

REX A. ZENT,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that a state judicial construction of a penal statute, which retroactively extends the reach of the statute to criminalize an act after the act occurs, violates the due process principle of *Bouie v. Columbia*, 378 U.S. 347 (1964) only if the construction is *both* "unexpected" *and* "indefensible by reference to the law which had been expressed prior to the conduct in issue".

2. Whether the Court of Appeals was correct in holding that a state court can exempt a statutory presumption from the Sixth Amendment rule of *Sandstrom v. Montana*, 442 U.S. 510 (1979), by stating the presumption is "in effect" a definition of an element of the offense.

3. Whether the Court of Appeals was correct in holding that *Townsend v. Sain*, 372 U.S. 293 (1963) does not require an evidentiary hearing on disputed material facts, when a state court has resolved the factual dispute without considering the petitioner's evidence, which it rejected on a state evidentiary ground inconsistent with federal law.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Marvin Warner prays that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit issued June 7, 1993, affirming the denial of his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. Section 2254.

OPINIONS BELOW

The decision of the United States District Court for the Southern District of Ohio denying Mr. Warner's petition for a writ of habeas corpus, is unreported. It is reproduced as Appendix A.

The decision of the United States Court of Appeals for the Sixth Circuit affirming the denial of habeas corpus relief is reported at 997 F.2d 116. It is reproduced as Appendix B.

The order of the Court of Appeals denying a Petition for Rehearing is reproduced as Appendix C.

JURISDICTION

The decision of the Court of Appeals was issued on June 7, 1993. A timely petition for rehearing was denied on July 26, 1993. On October 14, 1993, Justice Stevens granted a Motion for Extension of Time, permitting Petitioner to file this Petition on or before November 24, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> nor shall any State deprive any person of life, liberty or property without due process of law. . . .

This case also involves 28 U.S.C. Section 2243, which provides in part:

> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

This case also involves several provisions of the law of the State of Ohio, which are set out in Appendix D.

STATEMENT OF THE CASE[1]

Petitioner Marvin Warner was the owner of Home State Savings Bank of Cincinnati. Home State was the largest victim of a fraud by ESM Government Securities, Inc., which involved (among other things) the bribery of a partner in the accounting firm of Alexander Grant & Co. to issue false financial statements for ESM.

When ESM's fraud and insolvency was revealed in March 1985, Home State was threatened with the loss of over $100 million in U.S. government securities supposedly held by ESM as collateral for Home State's investments. Home State collapsed; its loss exceeded the assets of the Ohio Deposit Guaranty Fund (OGDF). This led to a panic among depositors, an order by the Governor of Ohio temporarily closing all OGDF-insured institutions, and a major political crisis in the state of Ohio.

Mr. Warner had not been an officer or director of Home State since 1977; but he was its sole owner, and had been a prominent figure in political and financial circles in Ohio for many years. He became the focus of much of the depositor outrage and hostile publicity in the wake of the OGDF crisis.

A. The Proceedings in State Court.

In December 1985, Mr. Warner was indicted by the Home State Special Prosecutor, along with a bank officer, David Schiebel and a former president of Home State, Burton Bongard. The charges against Mr. Warner involved transfers by Home State in response to margin

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[1] The factual and procedural history of this case is set out in some detail (and in the light most favorable to the prosecution) in the decision of the Court of Appeals below. App. B 1-17. We do not repeat that history here; but we have separately summarized the factual and legal background of each of the issues raised, in the argument supporting our request for its review.

calls by ESM on Home State's account between May and October of 1983, and disclosures issued in connection with Home State's sale of debentures in 1984.

There were 87 counts in the indictment against Mr. Warner as it went to trial. All of those counts alleged acts which were knowingly wrongful or committed "with intent to injure or defraud." Mr. Warner's defense was that he had relied on others and had done nothing with criminal knowledge or intent.

The trial jury acquitted Mr. Warner on 78 of the 87 counts, including every single charge on which the trial court's instructions required a finding of knowing or intentional wrongdoing.

Mr. Warner's jury did find intentional and fraudulent misconduct – but not by Mr. Warner. Burton Bongard, who as president of Home States had managed the investments with ESM, was convicted on all counts. Mr. Bongard later dropped his appeal and testified for the government against Mr. Warner in a federal prosecution involving the same events. The federal charges included allegations of intentional wrongdoing; Mr. Warner was again acquitted on every single count.

Mr. Warner appealed his state convictions. The Ohio Court of Appeals reversed, finding error in some seven different respects. *State v. Warner*, 1989 Ohio App. Lexis 4226 (1st App. Dist. No. C870222, November 15, 1989). However, the State appealed from that decision, and the Ohio Supreme Court reversed the Court of Appeals, and reinstated the convictions on all counts.[2] *State v. Warner*, 55 Ohio St. 31, 564 N.E.2d 1842 (1990). Certiorari was denied. 111 S.Ct. 1584 (1991).

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[2] There were interlocking opinions, each of which incorporated by reference parts of the other, in Mr. Warner's case and the appeal of his codefendant, *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990).

B. The Proceedings In District Court.

The Petition below was filed along with a Motion for Summary Judgment on four claims on which Petitioner believed he was entitled to relief as a matter of law. After successfully moving for a change of venue to the Western Division of the Southern District of Ohio, Respondent filed a Cross-Motion for Partial Summary Judgment on the same four claims. In response, Petitioner filed an alternative motion for an evidentiary hearing, which was summarily denied by the Magistrate Judge to whom the case had been referred.

In March 1991, the Magistrate Judge issued a Report and Recommendation that Respondent's summary judgment motion be granted. In April 1992, without further argument, he issued a second Report and Recommendation which rejected Petitioner's remaining claims, and recommended that the petition be dismissed without an evidentiary hearing.

Petitioner filed timely objections to both Magistrate's Reports. The District Court considered the objections without oral argument. On November 25, 1992, the District Court issued an opinion modifying the Magistrate's Reports in some respects, but accepting their recommendation that the petition be denied without an evidentiary hearing. Appendix A. The District Court concluded that "although Petitioner's trial cannot be characterized as error-free, the record has not established that Petitioner was denied his rights under the Due Process Clause to a fundamentally fair trial." Appendix A-28.

C. The Opinion of the Court of Appeals

A divided panel of the United States Court of Appeals for the Sixth Circuit affirmed the denial of habeas corpus relief, addressing and rejecting all the Mr. Warner's constitutional claims on their merits. Appendix B.

The panel was divided on the first question presented: whether the retroactive expansion of Ohio Rev. Code § 1153.01 denied Mr. Warner due process. *See* Appendix B 19-26; *id.* at 38-51 (Jones, J., dissenting). On the other issues, it was unanimous.[3]

A timely Petition for rehearing was denied without comment. Appendix C. This Petition followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW SETS A STANDARD FOR DETERMINING WHETHER A STATE COURT HAS VIOLATED THE CONSTITUTION BY RETROACTIVELY EXPANDING A CRIMINAL STATUTE, DIFFERENT FROM AND LOWER THAN THE ONE SET BY THIS COURT AND APPLIED IN OTHER CIRCUITS.

Certiorari should be granted here to determine whether the decision below is correct in its statement and application of the due process rule of *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

According to the Court of Appeals' majority, due process is violated by a state court's retroactive application of an expanded reading of a criminal statute, only where that reading is both "unexpected" and "indefensible by reference to the law which had been expressed prior to the conduct in issue." Appendix B-22. By its analysis, it is not enough that, at the time of the act, it "was impossible to ascertain that the legislature meant one thing rather than another;" it must be shown additionally "that the proposed interpretation would be as likely to defeat the purpose of the legislature as to promote it." *Ibid.*

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[3] The Court of Appeals' reasoning on each of the issues presented here is discussed in connection with the arguments which follow.

We submit this test is not *Bouie*'s, and it is not the right measure of due process. It differs substantially from the test applied by other Circuits, and provides too little protection against political pressures to declare unpopular conduct criminal after the fact.

A. Background: The Charged Violations of Ohio Rev. Code § 1153.01.

Six of the counts on which Mr. Warner was convicted involved transfers of funds in response to ESM margin calls between August and October 1983. These six counts alleged violations of Ohio Rev. Code § 1153.01. That statute consists of a single sentence:

> No president, director, trustee, committee member, secretary, treasurer, attorney, or other officer or agent of a building and loan association shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association; nor shall he issue or put into circulation a warrant or other order, or assign, transfer, cancel, or deliver a note, bond, draft, mortgage, judgment, decree, or other written instrument belonging to the association, or raise or receive money for and in the name of such association, unless authorized to do so by its board of directors.

1. The Mens Rea Problem.

The original indictment charged Mr. Warner with 41 counts of violating this statute, one count for each of 41 margin call payments made by Home State between May and October, 1983. On all these counts, the indictment charged that Mr. Warner acted "with intent to injure or defraud the bank." Although those words do not appear in the statute, the Ohio courts had long held that was the specific intent which the prosecution must prove, on

criminal charges brought under Section 1153 and all related Ohio banking statutes.[4]

In response to a defense pretrial motion to require the prosecution to elect which portions of the statute it was alleging Mr. Warner had violated, the trial court ordered the indictment amended to charge two counts for each allegedly improper margin call payment: one count of willful misapplication of bank funds; and one count of what came to be referred to as "unauthorized acts."[5] Mr. Warner thus stood charged with 82 counts of violating Section 1153 in these 41 transactions.

There was substantial Ohio caselaw regarding charges of misapplication of bank funds under Section 1153; but there was and is no reported case other than this one in which a defendant was charged with violating Ohio banking law by a transfer of funds which was "unauthorized," but not a "misapplication."

In adding the novel "unauthorized acts" charges to the Amended Indictment, the prosecution followed the established Ohio caselaw (*see* note 4, above) and alleged that the defendants acted "with intent to injure or defraud the bank." However, in pretrial motions it argued for a different *mens rea* – "knowingly." The prosecution's argument was adopted from the minority rule in the cases interpreting a similar federal statute. The

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[4] *See State v. Keith*, 91 Ohio St. 132, 110 N.E. 188 (1914); *Peskind v. State*, 4 Ohio L. Abs. 452 (Ct. App. 1926); *Peskind v. State*, 115 Ohio St. 279, 152 N.E. 670 (1926) (separate case); *Riegle v. State*, 45 Ohio App. 251, 186 N.E. 875 (1933); *McNary v. State*, 128 Ohio St. 497, 191 N.E. 733 (1934); *State v. Huffman*, 131 Ohio St. 27, 1 N.E. 2d 313 (1936).

[5] The "unauthorized acts" counts alleged essentially that the defendants, "with intent to injure or defraud the Bank, did [on a specified date] . . . assign, transfer or deliver a note, bond, draft or other written instrument belonging to the Bank [in a specified amount] . . . to ESM, without the authorization of the Bank's Board of Directors. . . . "

defense argued that the Ohio caselaw required what the indictment charged: "intent to injure or defraud." Shortly before trial, the trial judge suggested another possibility – that these charges should be governed by Ohio Rev. Code § 2901.21(B), which provides that, where no other *mens rea* was prescribed by a "section," the intent required was "recklessness." As the trial went on, the judge gravitated toward that position. He finally decided the issue just before instructing the jury that recklessness was the proper standard on the "unauthorized acts" charges.

On the parallel "misapplication" counts, the judge instructed the jury that it had to find "intent to injure or defraud." The jury acquitted Mr. Warner on all 41 of the misapplication counts. Mr. Warner was also acquitted on 35 of the 41 counts of "unauthorized acts."[6] The six counts on which he was convicted involved margin call payments which Mr. Warner testified he approved in an effort to reduce Home State's involvement with ESM, without forfeiting its collateral.[7]

2. The Wire Transfer Issue.

After the jury's verdict, Mr. Warner's counsel made a motion for Judgment of Acquittal which pointed out that no "written instrument" had been involved in these transactions, as the Amended Indictment alleged: the transactions all involved electronic Fedwire transfers of

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[6] Mr. Warner was acquitted of all charges which involved transactions between ESM and Home State before August 1983 – thus vindicating the defense position that Mr. Warner was unaware of and uninvolved in those transactions, which were the principal cause of Home State's exposure.

[7] The Home State Board of Directors ratified all of these margin payments. However, the Ohio Supreme Court held – in yet another groundbreaking ruling – that ratification was no defense to a charge of "unauthorized" transfers, even where there is no allegation of intentional wrongdoing. *State v. Warner*, 564 N.E.2d at 49-50.

money. The prosecution responded by moving to further amend the indictment, to add different language from Section 1153.01 alleging that by these margin call payments Mr. Warner had "issue[d] or put into circulation a warrant or other order" without authorization. The trial court permitted the amendment and entered judgment accordingly. *See State v. Warner*, 564 N.E.2d at 45.

The Ohio Court of Appeals held that this amendment after the trial was invalid, and that the indictment on which the case was tried could not support the conviction because a Fedwire transmission of bank funds did not constitute the "transfer" of "a written instrument belonging to the bank." On the State's appeal from that decision, the Ohio Supreme Court agreed "that the trial court erroneously granted the post-trial amended indictment," *State v. Warner*, 564 N.E.2d at 51; but it held "Warner was not prejudiced by the post-trial amendment because his conviction was supported by the original amended indictment" which used the "written instrument" language. *Ibid.* Calling it an issue "of first impression for this Court," the Ohio court held a wire transfer of bank funds did constitute the "transfer [of] . . . a . . . written instrument belonging to the [bank]," within the meaning of Section 1153.01. *Id.* at 45. The Court explained its decision as follows:

> In today's modern banking environment, electronic transfers have become commonplace. On an average day, six hundred billion dollars in funds are transferred by wire or electronic means. . . . This vastly exceeds the amount transferred by check. . . . As noted in the discussion above, under modern day conditions, transferring assets of a savings and loan association over the Fedwire is the equivalent of sending a check or issuing a draft.
>
> Through RC 1153.01, the General Assembly clearly intended to criminalize the unauthorized transfers of an association's assets regardless of form. Thus, the transfer of funds through the

> Fedwire system qualifies as a "draft" or other "written instrument" as those terms are used in RC 1153.01. Accordingly, the Court of Appeals' conclusion that the unauthorized transfer of Home State's assets over Fedwire did not constitute a "writing" within the meaning of RC 1153.01 was erroneous.

State v. Warner, 564 N.E.2d at 47.

3. The Bouie Problem.

The upshot of the Ohio Supreme Court's decision was that Mr. Warner stood convicted of six felony counts which had no precedent in the Ohio law. His actions were held to be criminal, although they were not committed with the fraudulent intent which the Ohio courts had always before required to make out a violation of state banking laws, and which the prosecutors themselves thought was an element of the offense when they drafted the indictments in this case. His authorization of the Fedwire transmission of funds to cover bank investments was deemed the "transfer . . . [of a] written instrument belonging to the [bank]" – though no Ohio case had ever so characterized such a routine bank activity, and though the prosecutors, the trial judge, and the Ohio Court of Appeals judges all plainly believed that the statute did not support such a characterization.

Mr. Warner's counsel filed a motion for rehearing in the Ohio Supreme Court, reiterating their objections to this under state law and the federal constitution, and pointing out specifically that its expansion of the statute violated the due process principle of *Bouie v. Columbia*.[8]

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[8] In their earlier briefs on these points, Mr. Warner's lawyers mainly relied on state precedent; but they backed their arguments with citations to the "rule of lenity," and the due process right to fair warning. See *Dunn v. United States*, 442 U.S. 100 (1979); *United States v. Bass*, 404 U.S. 336 (1971). When the

The Ohio Supreme Court rejected this argument without comment.[9]

B. The Decision Below Eviscerates Bouie.

The Court of Appeals was divided on the *Bouie* issue. Judge Nelson's majority opinion held that there had been no due process violation; Judge Jones dissented, arguing there was.

The crux of the difference between the majority and the dissenting opinions was the standard by which to determine whether a state court's retroactive expansion of a criminal statute violates the federal constitution. This is the standard the panel majority used:

> Mr. Warner cannot prevail on this claim without persuading us that the Ohio Supreme Court's construction of Ohio Rev. Code § 1153.01 was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," *Bouie [v. City of Columbia], supra*, 378 U.S. at 354, or that it was impossible to ascertain that the legislature meant one thing rather than another, and that the proposed interpretation would be as likely to defeat the purpose of the legislature as to promote it. *See Connally [v. General Construction Co.], supra*, 269 U.S. at 394.

App. B-22. Judge Jones' dissenting opinion argued that it was enough that an "unforeseeable judicial enlargement

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Ohio Supreme Court rejected their arguments and approved these novel constructions of Section 1153.01, they argued that violated the parallel principles set out in *Bouie*.

[9] The State disputed the *Bouie* claim on its merits, and did not suggest it was not timely raised; nothing in the Ohio Supreme Court's Order denying rehearing suggested it so found. We therefore believe the District Court was wrong in holding this claim defaulted and the Court of Appeals was correct in reaching its merits. *See* App. B 19, 21 n.4.

of a criminal statute [was] applied retroactively . . . " App. B-39. The difference between these opinions goes to the heart of *Bouie*'s due process rule.

1. Bouie Requires Fair Notice of the Criminal Law's Prohibitions.

The panel majority's quotation from *Bouie* is not precisely accurate: the quoted language it attributes to the Court is actually a passage which the *Bouie* opinion quoted from a criminal law hornbook (Hall, *General Principles of Criminal Law* [2d ed 1960]). *See Bouie v. Columbia*, 378 U.S. at 354. The language of this quotation differs in a critical respect from the language used elsewhere in the *Bouie* opinion to describe its constitutional rule: whereas it speaks of judicial constructions which are "unexpected *and indefensible* by reference to the [preexisting] law," the *Bouie* Court itself said the test was whether the state court's construction of a criminal statute was "so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him." 378 U.S. at 354. The *Bouie* opinion repeated this several times,[10] never adding the word "indefensible" to its statement of the rule, or the concept to its reasoning.[11]

The Court of Appeals majority's addition of a requirement that the state decision be "indefensible," as

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[10] *See id.* at 352 ("unforeseeably and retroactively expanded by judicial construction", "unforeseeable and retroactive judicial expansion"); *id.* at 353 ("construction unexpectedly broadens the statute", "an unforeseeable judicial enlargement of a criminal statute applied retroactively"); *id.* at 354-55 ("an unforeseeable state court construction of a criminal statute . . . applied retroactively").

[11] The Court in *Bouie* specifically said the South Carolina Supreme Court's "construction [of the law] is of course valid for the future. . . . " *Id.* at 362.

well as unforseeable, is new law. Other Circuits follow *Bouie*'s standard of forseeability and fair notice.[12]

The departure of the decision below from that standard was not merely incidental or semantic; it was crucial to its analysis and its disposition of this issue in this case. That analysis turned *Bouie*'s notice principle on its head:

> The Ohio statutes, as we read them, *would not* suggest to anyone of common intelligence that a building and loan association agent who, without authorization by the board of directors, recklessly transferred a draft belonging to the association *would not have to worry* about criminal liability as long as he had no intent to injure or defraud.

App. B-19 (emphasis added).

This reasoning not only substitutes the view of a federal reviewing court, with hindsight, for that of a citizen trying to manage complex affairs without violating the law; it also changes *Bouie*'s rule from a requirement of notice to a prohibition of entrapment.

Bouie grew from precedents holding "the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta [v. New Jersey*, 306 U.S. 451 (1939)], or to 'guess at [the statute's] meaning and differ as to its application,' as in *Connally [v. General Construction Co.]*." *Bouie v. Columbia*, 378 U.S. at 352. These precedents set the standard of "fair warning to which the Constitution entitles" all citizens. *Id.* at 354.[13]

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[12] *See e.g. Maney v. Zenon*, 978 F.2d 715 (9th Cir. 1992); *Lustgarden v. Gunter*, 966 F.2d 552 (10th Cir.), *cert. denied*, 113 S.Ct. 624 (1992); *Davis v. Nebraska*, 958 F.2d 831 (8th Cir. 1992); *Helton v. Fauver*, 930 F.2d 1040 (3rd Cir. 1991).

[13] It is because of this that it is significant that the prosecutors and state lower court judges misread the statute at issue in this case. *Cf. Bouie v. Columbia*, 378 U.S. at 362: "neither the

The majority decision below lowers that standard substantially. It sees no constitutional problem in uncertainty, so long as a statute language does not affirmatively "suggest [a citizen] . . . would not have to worry about criminal liability" by taking a specified action. Its approach appears to be premised on the idea that any act can be punished, so long as no statute[14] clearly says it is *not* a crime, an idea inimical to our basic notions of government and freedom. Under our Constitution, the government can punish only those acts which are clearly and specifically designated to be crimes; it is not free to criminalize acts after the fact, simply because they were not specifically permitted by law.

The flaw in this reasoning can be made further apparent by applying *Bouie*'s constitutional touchstone: the *Ex Post Facto* Clause. An *ex post facto* law does not have to be "indefensible" to be unconstitutional; it may prohibit acts which everyone would agree the law should have prohibited all along. But it still cannot be applied to punish someone if it was " 'not enumerated in the statute' at the time of their conduct." *Bouie v. Columbia*, 378 U.S. at 363.

The decision below forgets this, finding it sufficient that punished acts were "the equivalent" of what the law had explicitly prohibited. App. B-23.[15] The Constitution

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South Carolina Legislature nor the South Carolina Police anticipated the present construction of the statute."

[14] The majority decision below also appears to forget that the state law to which reference must be made includes not only statutes, but also the gloss of state judicial decisions. *See Bouie v. Columbia*, 378 U.S. at 356-57. That was a crucial point in this case: before Mr. Warner's case every Ohio decision this century had held that the *mens rea* for all sorts of banking violations was "intent to injure or defraud," regardless of the specific statutory language. *See* note 4, above.

[15] The Court of Appeals' majority did its own bit of judicial legislation, in holding that what Mr. Warner actually transmit-

does not permit states to punish any other behavior which a court deems "equivalent" to a statutorily defined crime, after the fact. No doubt, in the eyes of the South Carolina authorities, Mr. Bouie's refusal to leave private property after being told to do so was "the equivalent" of entering after being told that entry was prohibited; this Court held that "equivalence" was no substitute for clear statutory notice. It is similarly not enough that a panel of judges think Mr. Warner "knew, or should have known" his bank was making large investments "that were obviously unsafe and unsound." App. B-26.[16] Mr. Bouie knew or should have known he was unwelcome at the lunch counter; a policeman told him to leave. That did not make it any less unconstitutional to change the law after the fact, to make his action a crime. "It is one thing to say that a person [engaging in risky conduct] . . . may be . . . sued in a civil action, and quite another to say he may be convicted and punished as a criminal." *Bouie v. Columbia*, 378 U.S. at 358.

2. The Bouie Principle is Essential To a Free People.

The decision below correctly notes that "[i]n today's world . . . business people are subject to extraordinarily complex statutory rules at all levels of government. . . ."

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ted was not only a "written instrument," but a "draft" – an alternate theory even the Ohio Supreme Court would not adopt. *See State v. Warner*, 564 N.E.2d at 47. Federalism issues aside, what this illustrates is, again, that there is no clear reading of this law which can fit Mr. Warner's actions.

[16] Although we disagree with this characterization of the transfers made at Mr. Warner's direction, we recognize that it is consistent with the jury's verdicts. The same cannot be said, however, for the panel's reference to payments that were made at Mr. Warner's "sufferance" (*ibid.*); the jury acquitted Mr. Warner of all responsibility for transfers other than the six he authorized.

App. B-25. Business, and life, necessarily involves risks. A major public crisis or failure often produces the kind of public outcry to fix responsibility through the criminal law – whether or not that law properly applies. As it did in Marvin Warner's case, such an outcry places enormous pressure on elected legislatures and courts. That is one of the reasons the right to be free from *ex post facto* legislation was placed in the Constitution. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389, 1 L.Ed. 648 (1798).

The *ex post facto* principle was considered by the Framers to be so important that they placed it in the Constitution twice,[17] and singled it out as a particularly appropriate subject for judicial enforcement. *See The Federalist* Nos. 44, 78 (J. Cooke Ed. 1961). The decision below dilutes this principle to an extent that should chill any government or business executive called upon to make decisions and take action in a crisis. Under its reading of the Constitution, a person in such a position – and, indeed, any citizen – cannot be assured that the penal code and accompanying regulations and caselaw will show the line beyond which the criminal law will not let them go. They must fear criminal prosecution for any act which it can be plausibly argued, after the fact, can be fit within the language or intent of any existing law.

If this decision stands, it can only increase the timidity and unwillingness to accept responsibility which plagues this nation. As if the threat of civil liability and public obloquy were not enough, this decision tells government and business leaders if there is a crisis on their watch, they may face criminal conviction – regardless of whether they do anything previously thought criminal – if a team of specially selected lawyers can later construct

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[17] "So much importance did the [c]onvention attach to [the *ex post facto* rule] that it is found twice in the Constitution." *Kring v. Missouri*, 107 U.S. 221, 227 (1883).

an argument which is not "indefensible" that their conduct was the "equivalent" of something proscribed by a clause in some obscure statute.

Certiorari should be granted here to declare this is not the law.

II. THE COURT OF APPEALS' DECISION ABDICATES THE FEDERAL COURTS' RESPONSIBILITY TO ENFORCE THE RULE OF *SANDSTROM V. MONTANA*.

Certiorari is also called for here, because the decision below reduces the Sixth Amendment rule of *Sandstrom v. Montana*, 442 U.S. 510 (1978), to mere semantics. According to the decision below, *Sandstrom* can be avoided by the simple expedient of a state court's pronouncement that a presumption is, "in effect", a definition of a statutory term. That reduces *Sandstrom*'s rule to a word game, and abdicates the responsibility of federal courts to decide this federal constitutional question.

A. Background: The Charged Violations of Ohio Securities Law.

The remaining three counts on which Mr. Warner was convicted involved charges that he had violated Ohio securities law in a debenture offering in 1984. The gravamen of these charges was that Mr. Warner had permitted the offering to be circulated without adequate disclosure of Home State's financial difficulties and its involvement with ESM. Mr. Warner's defense was that he had relied on the attorneys and accountants he hired to prepare and review the circular to ensure it was not false or misleading.

The securities counts alleged that Mr. Warner had violated Ohio Revised Code § 1707.44(B)(4), which makes it a crime for a person selling securities to "knowingly make or cause to be made any false representation concerning a material and relevant fact"; Ohio Revised Code § 1707.44(J), which prohibits public statements regarding

the value of securities made "with purpose to deceive"[18] by a person who "knows that such statement or advertisement is false in any material respect"; and Ohio Revised Code § 1707.44(G), which prohibits persons "selling securities . . . knowingly engag[ing] in any act or practice which is [elsewhere] . . . declared illegal, defined as fraudulent, or prohibited." *See* Appendix D 1-2.

Ohio Revised Code § 2901.22 contains the basic statutory definition of "knowledge" in Ohio law: "[a] person has knowledge of circumstances when he is aware that such circumstances probably exist." The trial judge so instructed the jury; but he also instructed it on what he what he called "the presumptive statute as to one should know," Ohio Rev. Code § 1707.29.[19] That section, which the Ohio Code unofficially[20] titles "Presumption of Knowledge," provides that the accused in a securities case "shall be deemed" to have had knowledge of any matter of fact he should have known. *See* Appendix D-1. This was the essence of the trial court's (oral) instruction:[21]

> In any prosecution brought under Section 1707.01 to 1707.45 of the Revised Code, the accused *shall be deemed* to have knowledge – to have had knowledge of any matter of fact, where in the exercise of reasonable diligence, he

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[18] Although Section 1707.44(J) refers to a "purpose to deceive," the trial court defined "the phrase purpose to deceive" as "to *knowingly* deceive another or cause another to be deceived by any false or misleading representation . . . or by any other conduct, act or omission which creates, confirms, or perpetrates a false impression in another. . . . " (Emphasis added.)

[19] In its arguments to the trial court, the prosecution also referred to this statute as creating a "presumption."

[20] Statutory titles do not have the force of law in Ohio. Ohio Rev. Code § 1.01.

[21] Here as elsewhere, the written instructions used somewhat different language. *See* Argument III, below.

> should, prior to the alleged commission of the offense in question, have secured such knowledge.

(Emphasis added.) The court went on to instruct that "reasonable diligence" was the opposite of simple negligence: "of a character exercised by a fair and ordinarily prudent person under the same or similar circumstances."

The defendants' objections to these instructions under *Sandstrom v. Montana* were overruled by the trial court, and by the Ohio Court of Appeals. The appeals court purported to follow the only previous post-*Sandstrom* Ohio case to address this section, *State v. Trivedi*, 8 Ohio App. 3d 412, 457 N.E.2d 868 (1982), which had said the statute creates a "presumption of knowledge [which] . . . is not mandatory but rebuttable. . . . " 457 N.E.2d at 871.

The judgment of the lower Ohio courts on this point was affirmed by the Ohio Supreme Court. It said that Section 1707.29 reflected a "legislative intent . . . to, in effect, define the knowledge requirement for certain violations of Ohio's securities act. . . . " *State v. Warner*, 564 N.E.2d at 42. "[I]nstead of creating a presumption as alleged by Warner, R.C. 1707.29 merely sets forth what the term knowledge encompasses for purposes of criminal liability." *Ibid.*

The Magistrate, the District Court, and the Court of Appeals all found these statements conclusive of the issue. *See* Appendix A-28-29; *Ibid.* The Court of Appeals cited *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991), and held the Ohio courts' "interpretation" of their statute was entitled to deference unless it was "an obvious subterfuge for evading the Constitution. . . . " Appendix B 38-39.

B. The Decision Below Lets State Courts Decide Sandstrom's Federal Question

The Sixth Amendment requires the state to establish the existence of every element of the crime by proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 368 (1970). This is perhaps the most fundamental constitutional principle applicable to criminal cases. *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993).

Sandstrom v. Montana, 442 U.S. 510 (1979) held that this principle forbids states from relieving the state of its burden by instructions which tell the jury that they need not find an element of the offense if they find another fact from which it can be presumed. Whether a jury instruction violates *Sandstrom* is a "federal constitutional question" which " 'requires careful attention to the words actually spoken to the jury. . . . ' " *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985), *quoting Sandstrom v. Montana*, 442 U.S. at 514. The crucial words spoken to the jury in this case were these: "the accused shall be deemed to have had knowledge of any matter of fact, where by the exercise of reasonable diligence he should . . . have secured such knowledge." This Court and other lower federal courts have repeatedly held that exactly these same words – "shall be deemed" – create a "presumption."[22] The Court of Appeals did not consider that

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[22] *See National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. ___, 112 S.Ct. 1394, 1405 (1992) (act providing Amtrak's need for property "shall be deemed" established under certain circumstances created "strong presumption"); *Lavine v. Milne*, 424 U.S. 577 (1976) ("rebuttable presumption" created by welfare rule using phrase "shall be deemed"); *Local 232 of the AFL-CIO v. Briggs & Stratton Corp.*, 837 F.2d 782, 785 (7th Cir. 1988) (contract language that grievances "shall be deemed arbitrable" creates a "presumption of arbitrability"); *Cavender v. Donovan*, 752 F.2d 1376, 1377 (9th Cir. 1985) (statute saying employees "shall be deemed adversely affected" creates "a conclusive presumption"); *Estate of Wood v. Commissioner of Internal Revenue*, 909 F.2d 1155 (8th Cir. 1990) (law that date of postmark "shall be deemed the date of delivery" creates "a presumption of delivery"); *Catlin v. Ambach*, 820 F.2d 588 (2d Cir. 1987) (statute providing that students 'shall be deemed residents" of family home creates "a presumption"); *United States v. Borello*, 766 F.2d 46 (2d Cir. 1985) (statutory "presumption" that "possession shall be deemed evidence sufficient to authorize conviction of smuggling"); *In the Matter of Steel Ship Corp.*, 576 F.2d 128 (8th Cir. 1978) (statutory rule that contract not assumed "shall be deemed to be rejected" creates a "presumption of rejection").

federal law, but instead deferred to the Ohio courts' statements about the effect of this instruction. Appendix B 38-39. This contravened the teaching of *Sandstrom* – where the Court declined to defer to the Montana Supreme Court as to the "effect" of the challenged instruction. *See* 442 U.S. at 517.

It also attributed to the Ohio Supreme Court more than it actually said: the Ohio Supreme Court never directly labeled Section 1707.29 a "definition";[23] it said only that the statute "in effect, defined" knowledge. If that were dispositive, *Sandstrom* would mean nothing. *All* presumptions "in effect, define" the presumed fact, and contribute to what the presumed fact "encompasses for purposes of criminal liability. . . . "

The statutes defining the securities violations charged here set out the elements of those offenses; the mental element of each of them is "knowingly." *See* Appendix D-2. The word "knowingly" is expressly defined by Ohio Rev. Code § 2901.22; the definition requires actual, subjective awareness. *See* Appendix D-2. The trial court instructed the jury on this statutory definition, twice – once just before the instructions on the securities counts. It never suggested that "the presumptive statute as to one should know" changed that definition, or the element of the charged offenses.

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[23] In a strict sense, it is logically impossible to call this statute a "definition" of the word "knowledge." The statute clearly envisions a circumstance where the person "should . . . have secured such knowledge" but did not. Considered as a definition of the word "know", it would be an absurdity: It is the equivalent of saying "to know means (1) to know or (2) not to know, if the person should know." Considered as a "presumption" – what the Ohio Legislature called it – the statute makes perfect sense, presuming the ultimate fact ("knowledge") from the predicate fact ("lack of knowledge, where one should know"). However, so considered it is unconstitutional.

Under federal law, the elements of the offense which must be proved, and cannot be presumed, are found in the statute "which defines the substantive crime." *United States v. Romano*, 382 U.S. 136 (1965); *see Tot v. United States*, 319 U.S. 463, 472 (1943). If the Ohio Supreme Court had said Section 1707.29 defines securities crimes, a harder question, involving a direct conflict between federal and state analysis would be presented. But what it did instead was talk about the "effect" of the statute on what the law "encompasses." In this context, that was a federal, not state, question. As the Court has written in another context:

> [T]he argument is not merely that the state court misapplied state law, but that the characterization of this proceeding . . . for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law.

Hicks v. Feiock, 485 U.S. 624, 630 (1988). A state court's statements may provide "strong guidance" on such an issue, *id.* at 631, but cannot be conclusive of the federal question. *Brown v. Allen*, 344 U.S. 443 (1953).

By reading more into the Ohio Supreme Court's opinion than it said, and by holding those statements conclusive unless they were shown to be pretextual, the Court of Appeals abdicated its role as the ultimate arbiter of this federal issue. Its action highlights a difficult problem in the application of *Sandstrom* and other Sixth Amendment rules: how federal courts are to identify the elements of state offenses, to which the federal constitution applies.

To correct the Court of Appeals' error, and to shed light on that problem, certiorari should be granted on this issue, as well.

III. THE PANEL'S AFFIRMANCE OF THE DENIAL OF AN EVIDENTIARY HEARING ON WHETHER THE JURY RECEIVED THE COURT'S SUPPLEMENTAL WRITTEN INSTRUCTIONS CONTRAVENES *TOWNSEND V. SAIN*, 372 U.S. 293 (1963).

The final reason certiorari should be granted in this case is the Court of Appeals' clear misunderstanding of the rule of *Townsend v. Sain*, 372 U.S. 293 (1963). The Court of Appeals confused *Townsend* and 28 U.S.C. § 2254(d), commented on the credibility and weight of testimony from juror-witnesses who had never been allowed to testify, affirmed the denial of a federal evidentiary hearing, and deferred to a state court's finding of historical fact – although the state court had made its findings without considering the defense evidence.

With respect, we submit the Court of Appeals' decision on this issue is so clearly incorrect and inconsistent with *Townsend*'s mandatory rule that summary reversal is appropriate.

A. Background: The Disputed Record of The Trial Court's Jury Instructions.

The judge who presided at Mr. Warner's trial had a general practice of refusing to permit lawyers to review the written jury charge. Although both sides asked to see copies of the written jury charge, the judge refused. When defense counsel expressed confusion about what the instructions would be, the judge accused them of making "a powerplay . . . to make me depart from my normal procedure, to never give lawyers the charge."

The instructions ultimately given the jury were extensive. The oral charge took 81 pages of transcript. The original written jury instructions ran over 200 pages. Although this voluminous document was sent into the jury room, none of the lawyers, defense or prosecution, was permitted to see it.

In the midst of jury deliberations defense counsel learned that several key instructions which the trial court had given orally had not been delivered to the jury in

writing at all. *See State v. Schiebel*, 564 N.E.2d at 64-65. At defense counsels' request, written instructions on those subjects were prepared, and the judge agreed to have them added to the jury's instruction book. *Ibid.* However – according to statements by the jury foreman and several other jurors, which were submitted by the defense in post trial motions – no supplemental or additional instructions were received by the jury after its deliberations began.

After trial, the instructions themselves were rifled through by news reporters and spilled on the floor. The supplemental instructions supposedly given to the jury were never found.

Mr. Warner's brief to the Ohio Court of Appeals challenged these actions, and questioned whether the jury received the "supplemental" written instructions. Only then – ten months after trial, after the jury foreman had died, and after the court reporter's records were destroyed – the State moved to "correct" the record to include the lost instructions. This motion was heard by a new trial judge – Judge Robert Ruehlman – who presided over the case only briefly.[24] Judge Ruehlman granted the state's motion to "correct" the record without hearing testimony, holding – contrary to the circumstantial evidence and the affidavits of the jurors – that the supplemental instructions given orally were also delivered to the jury in writing in the form set forth in the transcript.

On appeal, the state Court of Appeals held that the trial court's refusal to let counsel see the written instructions was constitutional error, noting that "the oral charge was rife with the trial court's qualifications, modifications and explanations of the written charge. . . . " On the State's appeal from that decision, the Ohio Supreme Court agreed that the

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[24] Judge Ruehlman came onto the case after Judge Niehaus recused himself, in response to defense challenges to statements he made about the case in television interviews. Judge Ruehlman, in turn, was removed by the Ohio Supreme Court because of post-trial remarks which suggested an "anticipatory judgment . . . as contradistinguished from an open state of mind."

failure to provide defendants with a copy of the written instructions was constitutional error, *State v. Schiebel*, 564 N.E.2d at 70; but it accepted the "correction" of the record, holding that the jurors' affidavits regarding whether they actually received the supplemental instructions could not be considered under Ohio law. *Id.* at 67-68; *State v. Warner*, 564 N.E.2d at 44.

Mr. Warner therefore sought an evidentiary hearing by which he could present this evidence in federal court. The Magistrate, the District Court and the Court of Appeals all denied him that opportunity, each giving a different rationale for its' decision.

The Magistrate held that the Ohio courts' finding that the jurors received the written instructions should be presumed correct, under 28 U.S.C. § 2254(d). The District Court rejected that recommendation, because the Magistrate had not determined "whether the state courts provided petitioner with a full and fair evidentiary hearing." Appendix A-19. However, the District Court went on to decide that such a determination was unnecessary, because the claim was meritless was a matter of law:

> The alleged complete lack of written supplemental instructions and, more particularly, the alleged lack of a supplemental written instruction on "duty to disclose" or "good faith" caused petitioner no prejudice because the trial court instructed the jury orally on these matters . . . . Since the instructions taken as a whole contained these elements, the jury had before it the explanation petitioner sought and therefore no prejudice inured to petitioner's defense.

Appendix A-22.[25]

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[25] The District Court also suggested in passing that, although the Ohio courts had considered this issue without any suggestion it was procedurally barred, it was waived in state court. App. A 7. Respondent has not adopted that argument.

On appeal, Petitioner pointed out that the issues covered by the missing instructions were crucial to his defense, and their absence was likely prejudicial during the jury's nine-day-long deliberation. The Court of Appeals did not adopt the District Court's reasoning, but substituted its own as follows:

> [W]hile the hearing in the common pleas court on the merits of the motion to correct the record was a hearing by affidavit only, the circumstances were such that the hearing met the criteria specified in 28 U.S.C. § 2254(d). We take it as given that if there had been an oral hearing at which Mr. Warner called members of the jury to testify, at least two jurors would have testified that they did not remember seeing any supplemental written instructions. Such testimony, however, would not directly contradict the strong showing made by the state that the supplemental instructions were in fact delivered.
>
> The factual findings of the common pleas court must be presumed to be correct, under 28 U.S.C. § 2554(d), and we must assume, as did the Ohio Supreme Court, "that all four disputed supplemental instructions were reduced to writing and given to the jury." *State v. Schiebel*, 564 N.E.2d at 67. With this assumption, we have no hesitancy in rejecting Mr. Warner's claim of prejudice with respect to the jury instructions.

Appendix B-36.

B. The Decision Below Clearly Erred In Its Application of Section 2254(d) and Townsend v. Sain.

The Court of Appeals decision on this issue clearly misunderstands the allocation of fact finding responsibility between state and federal courts in habeas corpus cases.

First, it defers to the finding of a state court judge who expressly refused to consider the Petitioner's evidence on the subject. That evidence consisted of the testimony of two jurors, who swore they never received the supplemental written jury instructions.[26] The jurors' testimony and affidavits were rejected by the state courts under Ohio Rule of Evidence 606(b), which permits jurors to testify or submit affidavits regarding events which occur during their deliberations "only after some outside evidence of that act or event has been presented. . . ." *See* Appendix D-3. Those affidavits were admissible under Federal Rule 606(b), which contains no such restriction; and the Court of Appeals "took it as given" that the jurors could testify to what the affidavits said. Appendix B-36. Yet the Court of Appeals nonetheless declared – without any explanation – that the state "hearings" on this issue were "full and fair" under Section 2254(d). Plainly, they were not.[27]

Second, the Court of Appeals never mentioned the law that actually governed Petitioner's request for an evidentiary hearing: *Townsend v. Sain*, 372 U.S. 293 (1963). Its decision apparently equates *Townsend* with Section 2254(d). As the Court recently explained, that is mistaken:

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[26] The Court of Appeals incorrectly stated that these jurors merely "stated that they had no recollection of the constable's bringing them any additional written instructions." App. B-34. The jurors affidavits were much more definite than this. Juror Mr. Brady swore "I did not see these instructions during the deliberation, nor was their content read or otherwise made known to me." Juror Lafkaas said "I am certain that I never saw any such additional instructions or heard them referred to by anyone else."

[27] *See* 28 U.S.C. § 2254(d)(2), (3) and (6); *Ford v. Wainwright*, 477 U.S. 399, 413, 415, 418 (1986) (plurality opinion); *id.* at 423-24 (concurring opinion of Justice Powell); *Bibby v. Tard*, 741 F.2d 26, 31 (3d Cir. 1984); *Birt v. Montgomery*, 709 F.2d 690, 695-96 (11th Cir. 1983), *cert. denied*, 469 U.S. 874 (1984).

> *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. The two issues are distinct, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.

Kenney v. Tamayo-Reyes, 112 S.Ct. 1715, 118 L.Ed.2d 318, 330 n.5 (1992).

Townsend held that the discretionary power of a federal court to hear evidence in a habeas case is constrained in some circumstances, where an evidentiary hearing is mandatory:

> Where the facts are in dispute, the federal court in a habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

Townsend v. Sain, 372 U.S. at 312-13. There was no full hearing in state court on this issue, because the state courts excluded the juror affidavits on grounds inapplicable in federal court. "[T]he fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing . . . [and] the material facts were not adequately developed at the state-court hearing" because of the state court's refusal to hear them; a federal evidentiary hearing was

therefore mandatory under *Townsend*. 372 U.S. at 313.[28] Yet the Court of Appeals said nothing about it.

Instead – in its final and most startling error – the Court of Appeals' decision appears to weigh the jurors' testimony against the bailiff's, although neither its judges nor any other judge, state or federal has actually heard any of these witnesses testify. Appendix B-36. That exercise ignored the warnings this Court has often given, that "credibility determinations . . . [can]not accurately be made by an appellate court on the basis of a paper record." *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986); *see Amadeo v. Zant*, 486 U.S. 214 (1988).

And the problems inherent in any such undertaking greatly compounded by the Court of Appeals' misstatement of what the jurors' affidavits indicated they would say. *See* note 26, above.

Clearly, this is not the manner in which either this Court in deciding *Townsend*, or Congress in enacting Section 2254(d), intended facts to be found in federal habeas cases. The Court of Appeals decision is irreconcilable with *Townsend*, and plainly in error. Certiorari should be granted, and it should be summarily reversed on this point.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

MacDonald, Hoague &
Bayless
Timothy K. Ford
Attorneys of Record
for Petitioner

November 24, 1993

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[28] It is also notable – and, we would submit, sufficient to undermine the state courts' determination on this issue – that the two trial judges to whom the panel defers were *both* removed from this case for apparent bias against Mr. Warner.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARVIN L. WARNER,

Petitioner

v. C-1-91-579

REX A. ZENT,

Respondent.

Petitioner Marvin L. Warner, an inmate in state custody at the Madison Correctional Institution in London, Ohio, brings this action through counsel for a writ of habeas corpus pursuant to 28 U.S. § 2254. Petitioner raises eight grounds for relief. Claim D has been withdrawn. The remaining claims are A-C, E-H, and J.

On March 2, 1987, petitioner was convicted of six violations of Ohio Rev. Code § 1153.01, unauthorized acts, and three violations of Ohio Rev. Code § 1707.44, securities fraud. The Ohio Courts imposed a sentence of 10 1/2 years with 7 years suspended, restitution in the amount of $12,200,000.00, and vacated the assessment of costs in the amount of $250,000.00.

This matter is before the Court for de novo review of the record including the Report and Recommendation of the United States Magistrate Judge (doc. no. 49), petitioner's objections (doc. nos. 51, 52), respondent's memorandum in opposition (doc. no. 61), petitioner's reply (doc. no. 66), a second Report and Recommendation (doc. no. 62), petitioner's objections (doc. no. 67), respondent's reply (doc. no. 69), and petitioner's reply (doc. no. 70).

This matter is also before the Court upon the Magistrate Judge's Order denying petitioner bail pending appeal (doc. no. 63), and petitioner's objections and affidavit (doc. nos. 65, 68).

I.

In the first Report and Recommendation the Magistrate Judge rejected two of petitioner's claims on the merits and recommended denying petitioner's motion for summary judgment.

Petitioner objects to the Report and Recommendation on the ground that the Magistrate Judge failed to address his ex post facto-type claim, under which petitioner maintains that he was denied due process by the lack of notice at the time of the alleged unauthorized acts that "recklessly" engaging in such acts is a crime. Petitioner argues that since a reasonable person could not have foreseen the Ohio Supreme Court's "novel" interpretation of Ohio's unauthorized acts statute, the Ohio Supreme Court deprived him of due process by retroactively applying the "novel" interpretation of state law to his case, in much the same way as ex post facto legislation is constitutionally prohibited (doc. no. 52, p. 13) (citing *Davis v. Nebraska*, 958 F.2d 831 (8th Cir. 1992)).

Without reaching the merits of the claim, it appears from the record that petitioner's objection is well taken, since the Magistrate Judge did not address this claim. This Court therefore finds it necessary to examine petitioner's claim beginning with the issue of whether petitioner waived federal habeas corpus review by not

properly presenting the claim to the Ohio courts. *See Engle v. Isaac*, 456 U.S. 107, 124-25, 129, 135 (1982).

A.

Respondent contends that petitioner waived his ex post facto-type claim by not raising it in the Ohio courts until he included it in his motion to reconsider in the Ohio Supreme Court.

Petitioner argues that respondent has waived his waiver argument by not objecting to the Magistrate Judge's recommendation that petitioner's claims are properly before this Court.

Petitioner's waiver of waiver contention lacks merit, since the Magistrate Judge's conclusion regarding the absence of a waiver problem applied only to the two claims addressed in the first Report and Recommendation. *See* doc. no. 49, p. 12. Consequently, respondent's decision not to object to the Magistrate Judge's waiver conclusion has no significance on the issue of whether petitioner waived his ex post facto-type claim. Petitioner's waiver-of-waiver argument, moreover, is flatly inconsistent with his contention that the Magistrate Judge did not address his ex post facto-type claim in the first Report and Recommendation.

Accordingly, respondent has not waived his waiver argument in regard to petitioner's ex post facto-type claim.

B.

The Magistrate Judge has accurately set forth the legal principles applicable to waiver analysis (doc. no. 62, pp. 3-5). This Court therefore adopts these statements of law.

Petitioner acknowledges that he first raised his ex post facto-type claim in the Ohio courts in his motion for a rehearing before the Ohio Supreme Court (doc. no. 66, pp. 4-5). This did not constitute a procedural default, according to petitioner, because he necessarily relied on Ohio law as it was prior to the date the Ohio Supreme Court issued its opinion in his case. This Court disagrees.

Petitioner committed a procedural default by failing to fairly present his ex post facto-type claim to the trial court, the Ohio Court of Appeals, and the Ohio Supreme Court. *See Leroy v. Marshall*, 757 F.2d 94, 97, 99-100 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985). Although petitioner raised the claim in his motion to reconsider before the Ohio Supreme Court, petitioner does not point to a Sixth Circuit case or an Ohio case stating that such a presentation, or presentation of an issue in a similar manner, constitutes a fair presentation of the issue to the Ohio courts. *Cf. Castille v. Peoples*, 489 U.S. 346, 351 (1989) (raising a claim for the first time in a petition for allocutor before the Pennsylvania Supreme Court did not constitute fair presentation). By not raising his ex post facto-type claim in the Ohio courts prior to his motion for rehearing in the Ohio Supreme Court, petitioner failed to provide the Ohio courts with "a chance to mend their

own fences and avoid federal intrusion. . . . "[1] thereby committing a procedural default in regard to this claim. *See Leroy*, 757 F.2d at 97, 99-100.

Petitioner contends that there is no basis for procedural default where the Ohio courts have not found one. This contention lacks merit since the root of petitioner's waiver problem is not any inaction by the Ohio courts but rather his own failure to raise the claim in the Ohio courts until his motion to reconsider in the Ohio Supreme Court. *See id.* Given that failure, petitioner deprived the Ohio courts the opportunity of addressing the claim. This is classic waiver. *E.g.*, *Engle*, 456 U.S. at 124-25, 129, 135; *Ewing v. McMackin*, 799 F.2d 1143, 1149-50 (6th Cir. 1986); *Leroy*, 757 F.2d at 97, 99-100; *State v. Williams*, 51 Ohio St. 2d 112 (1977), *vacated on other grounds*, 438 U.S. 911 (1978).

Petitioner's reliance on *Shepard v. Foltz*, 771 F.2d 962, 965 (6th Cir. 1985) is not well placed. Petitioner properly gleans from *Shepard* the rule that if a prosecutor argues the merits of a claim on a state appeal and does not raise a procedural-default argument, then the federal court may assume the state court reached the merits of the claim. *Id.* at 965. This rule, however, applies only "[w]hen it is unclear from the face of the state court opinion whether the state court relied upon a procedural bar as a basis for rejecting a claim . . . " *Id.* The rule petitioner takes from *Shepard* is designed to resolve such ambiguities. *Id.* Where, as in the instant case, a petitioner fails to raise the claim in the state courts, there is no ambiguity

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[1] *Engle*, 456 U.S. at 128-29.

on the issue of procedural default. *Shepard* therefore does not aid petitioner in eliminating his procedural default.[2]

C.

In the presence of petitioner's procedural default, he must demonstrate both "cause" and "prejudice" in order to obtain federal habeas corpus review. *See Wainwright v. Sykes*, 433 U.S. 72, 87-91 (1977). Cause for a procedural default exists when the factual or legal basis of a claim was not reasonably available to defense counsel. *Amadeo v. Zant*, 486 U.S. 214, 222 (1988).

Petitioner's characterization of the Ohio Supreme Court's ruling as "novel," *supra*, p. 2, does not establish cause for his procedural default on his ex post facto-type claim, because petitioner has failed to show that his claim was not reasonably available to him when he presented his other claims to the Ohio courts. Petitioner battled at all levels of the Ohio courts against the use of the mental state of "recklessness." His claimed inability to know that he was committing a crime was available to him at all time during his criminal case. His trial strategy, however, was to argue for the highest degree of culpability rather than lesser culpability. When the Ohio Supreme Court rejected his argument, petitioner raised for the first time his ex post facto type claim in his motion for rehearing. He points to no fact or circumstance that prevented him from raising his ex post facto-type claim together with his

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[2] This analysis and conclusion also applies to petitioner's reliance on *Merlo v. Bolden*, 801 F.2d 252, 255 (6th Cir. 1986), *cert. denied*, 480 U.S. 909 (1987).

other claims in the Ohio courts. This omission is fatal for waiver analysis particularly as petitioner's claims of lack of notice at the time of the commission of the crimes were always available to him throughout his journey in the Ohio judicial system.

Petitioner has not raised additional arguments in explanation of his failure to properly raise his ex post facto-type claim in the Ohio courts or to establish that he suffered prejudice. He has therefore failed to establish either cause or prejudice for his procedural default.

Accordingly, petitioner has waived his ex post facto-type claim for the purpose of federal habeas corpus review.

II.

Petitioner argues, in claim H, that he was denied a fundamentally fair trial when the trial court failed to supply defense counsel with a copy of the written supplemental instructions prior to their submission to the jury. Petitioner primarily contends that he suffered prejudice because the written supplemental instructions materially varied from the court's oral supplemental instructions. Petitioner also points to three other types of prejudice he allegedly suffered, which will be reviewed below, *infra*, § II(C), pp. 21-25.

Respondent does not contend that petitioner waived claim H, and it appears from the opinions of the Ohio Court of Appeals and the Ohio Supreme Court that petitioner presented this claim to the Ohio courts. *See State v. Warner*, 55 Ohio St.3d 31, 58-59 (1990); *State v. Schiebel*, 55

Ohio St.3d 71, 86 (1990); doc. no. 28, part E, ex. 23, p. 46-c. This Court, however, is of the opinion the petitioner waived his right to raise claim H in a federal habeas corpus proceeding by failing to object to the trial court regarding the procedure used to provide the jury with the supplemental jury instructions and by failing to ask the trial court to present the written supplemental instructions to the jury on the record. *See Warner*, 55 Ohio St.3d at 59; *cf.* Ohio R. Crim. P. 30(A) ("A party may not assign as error the giving or failure to give any instruction unless he objects thereto before the jury retires . . . "). Petitioner's failure to object to the trial court's procedure constitutes a procedural default, since he did not give the trial court the opportunity to invoke the procedure he, in retrospect, thinks should have been followed. *Cf. Engle*, 456 U.S. at 128-29 (Habeas petitioner should give the state courts "a chance to mend their own fences and avoid federal intrusion.").

For the reasons that follow, the Court further finds that, in large part, petitioner's objections to the Magistrate Judge's rejection of Claim H are not well taken.

A.

Petitioner's claim that the trial court violated his right to a fundamentally fair trial by not providing defense counsel with a copy of the written supplemental jury instructions lacks merit. Petitioner does not point to any federal or state case holding that the federal Constitution requires a trial court to provide counsel with copies of written instructions. This Court's research, moreover, reveals no case directly on point with the facts

underlying petitioner's claim H. The cases most closely akin to petitioner's claim involve the issue of whether a trial court is required to provide the jury with a written copy of jury instructions. *E.g., United States v. Eberhardt*, 657 F.2d 221, 222 (8th Cir. 1981); *United States v. Previte*, 648 F.2d 73, 84-85 (1st Cir. 1981); *United States v. Johnson*, 466 F.2d 537 (8th Cir. 1972) (Per Curiam), *cert. denied*, 409 U.S. 1111 (1973); *United States v. Blane*, 375 F.2d 249, 255 (6th Cir.), *cert. denied*, 389 U.S. 835 (1967). Such cases do not assist petitioner since they neither establish nor implicate the existence of a constitutional right to written supplemental instructions.[3]

This Court further finds that in the absence of clear prejudice, a matter considered in depth in § II(C), *infra*, pp. 21-25, the particular procedure used by the trial court to instruct the jury is not a matter cognizable in a federal habeas action. *Cf. Wright v. West*, ___ U.S. ___, 112 S.Ct. 2482, 2490 (1992) ("[H]abeas corpus is not intended as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials, but only to guard against extreme malfunctions in the state criminal justice systems." (citation and internal quotation marks omitted)); *cf. also Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) ("The Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules."); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) (Federal courts are not free

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[3] There is no rule requiring federal courts to provide federal juries in criminal cases with a copy of its written instructions. *See* Fed. R. Crim. P. 30.

to issue a writ of habeas corpus "on the basis of a perceived error of state law."); *Smith v. Sowders*, 848 F.2d 735, 738 (6th Cir.), *cert. denied*, 488 U.S. 866 (1988).

Accordingly, to the extent that petitioner challenges the trial court's procedure in providing the jury written supplemental instructions without providing copies to defense counsel, petitioner's claim H rests on insufficient grounds for habeas corpus relief.

B.

Prior to reaching the merits of petitioner's contentions under claim H, this Court must resolve three preliminary issues: (1) Whether the Magistrate Judge erred in placing the burden on petitioner to show that he suffered prejudice as a result of the alleged variance between the oral and written supplemental instructions; (2) Whether the Magistrate Judge erred in deferring to the Ohio Supreme Court regarding the lack of material variance; (3) whether the Magistrate Judge should have held an evidentiary hearing to determine what variance, if any, existed.

1.

The Magistrate Judge characterized claim H as "a claim of ordinary trial error where no specific constitutional guarantee is implicated . . . " (doc. no. 62, p. 14), and consequently he placed the burden on petitioner to show he suffered prejudice in a manner that violated his right to a fair trial.

Petitioner objects to the Magistrate Judge's characterization of claim H as ordinary trial error and insists that the burden rests upon respondent to show the trial court's errors in handling the supplemental written instructions were harmless beyond a reasonable doubt. Petitioner further contends that the Ohio Supreme Court should have applied this harmless-error standard, therefore it erred in concluding that petitioner has not suffered any prejudice from the inability to inspect copies of the written supplemental instructions. *See Warner*, 55 Ohio St.3d at 59; *Schiebel*, 55 Ohio St.3d at 85-86.

The United States Supreme Court's recent review of harmless error jurisprudence in *Arizona v. Fulminante*, ___ U.S. ___, 111 S.Ct. 1246 (1991) provides the analytical framework for resolving petitioner's objections. Federal courts reviewing state criminal proceedings are concerned with two types of trial error: "[C]lassic 'trial error[s],' " which infringe a specific constitutional provision and which occur during the presentation of the case to the jury – for example, admission of evidence obtained in violation of the Fourth Amendment – and errors causing "structural defects in the . . . trial mechanism . . . ," which occur when a criminal defendant is denied a basic constitutional protection, thereby infecting the reliability of the trial's outcome – for example, the total deprivation of the right to counsel or the lack of an impartial judge. *Id.* at 1263-65. Classic trial errors are subject to harmless error analysis, because they can be "quantitatively assessed in the context of the other evidence presented . . . ," and because errors having no effect on the reliability of the jury verdict are "virtually inevitable" during trial. *Id.* at 1264. Errors causing structural defects,

in contrast, are never harmless regardless of the bulk of inculpatory evidence presented to the jury, since such defects destroy the reliability of the criminal trial's central function – to determine whether a criminal defendant is guilty or innocent. *Id.*; *see also Rose v. Clark*, 478 U.S. 570, 577 (1986).

Errors of state law are not cognizable in federal habeas corpus proceedings unless the errors were so egregious as to deny a petitioner his right under the Due Process Clause of the Fourteenth Amendment to a fundamentally fair trial. *Estelle v. McGuire*, ___ U.S. ___, 112 S.Ct. 475, 480 (1991); *Pulley*, 465 U.S. at 41; *Cooper v. Sowders*, 837 F.2d 284, 287 (6th Cir. 1988). The burden rests on the habeas corpus petitioner to show that claimed errors of state law deprived him or her of his right to a fundamentally fair trial. *E.g.*, *McGuire*, 112 S.Ct. 480-84; *Lundy v. Campbell*, 888 F.2d 467 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990); *Olsen v. McFaul*, 843 F.2d 918 (6th Cir. 1988); *Cooper*, 837 F.2d at 287-88; *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir.), *cert. denied*, 464 U.S. 951 (1983).

Both the Magistrate Judge and the Ohio Supreme Court correctly placed the burden on petitioner to show that he suffered prejudice in a manner that violated his right to a fundamentally fair trial. The Magistrate Judge accurately characterized petitioner's claim as "ordinary trial error," since petitioner does not claim, and the record does not show, that the trial court's procedure in providing the supplemental written instructions to the jury created a structural defect in the trial mechanism. *Cf. Vasquez v. Hillery*, 474 U.S. 254 (1986) (race-based exclusion of grand jurors); *cf. also Gideon v. Wainwright*, 372 U.S. 335 (1963) (total lack of defense counsel); *Tumey v.*

Ohio, 273 U.S. 510 (1927) (trial involving biased judge). Further, petitioner fails to point to any specific constitutional provision violated by the trial court (i.e. a classic error) that would trigger the harmless-error analysis. *See, e.g., Fulminante*, 111 S.Ct. at 1264-65 (admission of involuntary confession subject to harmless-error analysis); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence in violation of Fourth Amendment subject to harmless-error analysis).

In the absence of either a structural defect or a classic trial error, petitioner's only remaining basis for habeas corpus relief lies in the Due Process Clause where he must shoulder the burden of showing that he did not receive a fundamentally fair trial. *E.g., McGuire*, 112 S.Ct. at 480-84; *Lundy*, 888 F.2d 467; *Olsen*, 843 F.2d 918; *Cooper*, 837 F.2d at 287-88; *Walker*, 703 F.2d at 962.

This Court recognizes that one type of prejudice petitioner points to concerns the variation between the written and oral supplemental instructions. This claim of prejudice, to assist his argument, should be considered to concern the constitutionality of the jury instructions, a classic-error issue which may require respondent to show the error was harmless beyond a reasonable doubt. *E.g., Rose*, 478 U.S. 570.

If the jury instructions taken as a whole – including any variance between the written and oral supplemental instructions – violated petitioner's constitutional rights, and if the violation was not harmless beyond a reasonable doubt, then the violation stands alone as a basis for habeas corpus relief. *E.g., Sandstrom v. Montana*, 442 U.S.

510 (1979). If the variance in the supplemental instructions did not violate petitioner's constitutional rights, and as a result, did not constitute classic trial error, then petitioner retains the burden of showing that any prejudice he suffered from it violated his right to a fair trial. *E.g., McGuire*, 112 S.Ct. at 480-84; *Lundy*, 888 F.2d 467; *Olsen*, 843 F.2d 918; *Cooper*, 837 F.2d at 287-88; *Walker*, 703 F.2d at 962. In this case the variance claimed by petitioner would not be classic trial error. The alleged variance, at most, constituted an error of state law. *See infra*, pp. 21-25. There is no need, therefore, for a harmless-error analysis to resolve petitioner's challenge to the alleged variance in the supplemental instructions, and petitioner retains the burden of showing prejudice on claim H.

Accordingly, both the Magistrate Judge and the Ohio Supreme Court correctly placed the burden on petitioner to show that the trial court violated his right to a fundamentally fair trial by requiring petitioner to demonstrate that he suffered prejudice.

2.

Petitioner objects to the Magistrate Judge's decision to apply the statutory presumption of correctness, 28 U.S.C. § 2254(d), to what was a mixed issue of fact and law – whether the written supplemental instructions materially varied from the oral supplemental instructions.

The Magistrate Judge applied § 2254(d) to petitioner's claim H in the following manner:

> Both the Ohio Court of Appeals and the Ohio Supreme Court concluded that there were

> no material variations between the oral and written supplemental instructions regarding the investment power of a savings and loan association, motive and good faith. These factual findings, which have not been disputed by Warner in the petition, are entitled to a presumption of correctness. Moreover, the Ohio Supreme Court ruled as matter of state law, that defendants were not entitled to an instruction on the duty to disclose. In light of these state court findings, there has been no showing of prejudicial error. Indeed, if the instruction on the duty to disclose was delivered to the jury, as it must be assumed, it would have been prejudicial to the prosecution and not the defense.

doc. no. 62, p. 17 (citations omitted).

Historical facts underlying a constitutional issue are entitled to a statutory presumption of correctness. *See* § 2254(d); *see also Sumner v. Mata*, 455 U.S. 591, 597 (1982) (Per Curiam). "To overcome the presumption of correctness, the petitioner must establish by convincing evidence that the factual determination in the state court was erroneous." *Brown v. Davis*, 752 F.2d 1142, 1147 (6th Cir. 1985).

When issues of constitutional law involve mixed questions of fact and law – for example, the constitutionality of pretrial identification procedures, *Sumner*, 455 U.S. at 597, or whether defense counsel provided ineffective assistance, *Strickland v. Washington*, 466 U.S. 668, 698 (1984) – federal courts may place different weight on historical facts, which it must presume true, and may reach a different conclusion than reached by the state

courts on the ultimate legal issue of constitutionality. *Sumner*, 455 U.S. at 597.

A controversy exists regarding the proper standard of review that must be applied when a federal habeas court reviews a state court's decisions on mixed questions of fact and law. Justices Thomas, Scalia, Kennedy, and Chief Justice Rehnquist prefer deference to state court decisions on mixed questions, *Wright*, 112 S.Ct. at 2488, 2498-2500, while Justices O'Connor, Blackmun, and Stevens prefer to continue the long-established practice of applying the de novo standard to mixed questions, *id.* at 2493-98 (concurring in judgment).[4]

In determining what standard to apply, this Court is guided not only by the opinions in *Wright* but also by cases decided by the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit applies a de novo standard of review to the state courts' decisions on mixed questions of fact and law. *See Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992). The following is particularly instructive:

> We proceed then to our own independent evaluation of the matter, not at all bound by the conclusions reached by our state court colleagues or by our own colleagues, but respectful of their carefully considered and conflicting judgments about the trial errors alleged to have denied the petitioner due process of law.

Lundy, 888 F.2d at 471.

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[4] Neither Justice White nor Justice Souter reached this issue in *Wright*. 112 S.Ct. at 2493, 2500-03.

The weight of Supreme Court authority, moreover, appears to fall in favor of applying a de novo standard of review. *Wright*, 112 S.Ct. at 2496 (O'Connor, J. – citing 21 Supreme Court cases applying the de novo standard). Finally, this Court reads the following statements in *Brown v. Allen*, 344 U.S. 443 (1953), as mandating district courts look to state courts for guidance rather than governance on mixed questions of fact and law:

> [T]he District Judge must exercise his own judgment [on] so-called mixed questions . . .

Id. at 507;

> [P]rior State determinations may guide [the] discretion [of the district court] in deciding upon the appropriate course to be followed in disposing of the application.

Id. at 500 (brackets omitted);

> [T]here is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues . . .

Id. at 508; *see also Wright*, 112 S.Ct. at 2495 (O'Connor, J. concurring in judgment); *but see id.* at 2488 and n. 5 (Thomas, J.).

In light of the above, this Court finds that although district courts reviewing habeas corpus petitions should look to state courts for guidance on mixed questions of fact and law, district courts must review such questions de novo. *Wright*, 112 S.Ct. at 2493-98 (O'Connor, J. concurring in judgment). This Court therefore finds that the Magistrate Judge should have reviewed de novo the mixed question of law and fact regarding whether any variance between the written and oral jury instructions

was material. Certainly the underlying issue of whether the trial court provided the same or different supplemental instructions is a question of historical fact: either the written supplemental instructions were the same as the oral supplemental instructions, or they were not. Materiality, however, is a legal issue, particularly since petitioner raises it as an element of his fair trial claim.

Accordingly, in the absence of a de novo review by the Magistrate Judge, the Court rejects the Report and Recommendation's reliance on the Ohio Supreme Court's conclusion regarding the lack of a material variance between the written and oral supplemental instructions, doc. no. 62, p. 17. This Court must therefore determine whether petitioner is entitled to an evidentiary hearing on the issue of variance.

3.

Petitioner objects to the Magistrate Judge's reliance on the Ohio Supreme Court's factual determinations without holding an evidentiary hearing, since petitioner did not receive a full and fair hearing in the state courts on the factual issues underlying his claim that the trial court violated his constitutional rights by not providing defense counsel with a copy of the supplemental jury instructions. Specifically, petitioner claims that the trial judge who granted the state's motion to correct the record, whose order was affirmed on appeal, was not presiding during trial, did not participate in the events regarding the supplemental written instructions, and was later apparently removed for bias. Petitioner emphasizes that neither the trial court nor the Ohio Supreme Court

heard relevant testimony regarding the events surrounding the supplemental written instructions and did not consider juror affidavits which were admissible under Fed. R. Evid. 606(b).

28 U.S.C. § 2254(d) provides that an evidentiary hearing is mandatory in a federal habeas corpus action if one of six circumstances existed in the state courts including when state court determinations were not supported by the record or when a petitioner did not receive a full and fair evidentiary hearing in a state court. *See Townsend v. Sain*, 372 U.S. 293, 312-13 (1963). If a state court holds an evidentiary hearing, its factual determinations "shall be determined to be correct." *Sumner*, 455 U.S. at 592. A petitioner who fails to allege facts sufficient to support a writ of habeas corpus is not entitled to an evidentiary hearing in federal court. *Townsend*, 372 U.S. at 312. In this light then the Court must examine petitioner's contention regarding the Magistrate Judge's decision to defer to the Ohio Supreme Court (doc. no. 62, pp. 16-17).

While this Court is bound by the Ohio Supreme Court's decision to affirm the trial court's decision to correct the record, since that decision concerned the state law question of whether the Ohio R. App. P. 9(E) required the trial court to hold an evidentiary hearing, *see Warner*, 55 Ohio St.3d at 58-59; *Schiebel*, 55 Ohio St.3d at 81-83, this Court must examine anew questions of fact underlying petitioner's claim of variance between the oral and supplemental jury instructions. *See Townsend*, 372 U.S. at 312. Accordingly, the Magistrate Judge erred to the extent he presumed correct the Ohio Supreme Court's decisions on factual questions supporting petitioner's claims of variance without first determining whether the state

courts provided petitioner with a full and fair evidentiary hearing (doc. no. 62, p. 16-17). This error, however, was insignificant for the reasons explored in the previous sections, *supra*, § II(A)-(B), pp. 9-15, as well as the following section, *infra*, § II(C), pp. 21-24. Assuming that the oral and supplemental jury instructions differed as petitioner alleges, he is not entitled to an evidentiary hearing on the factual questions underlying his claims of variance because the differences are insufficient to support a writ of habeas corpus. *See supra*, § II(A)-(B), pp. 9-15; *infra*, § II(C), pp. 21-25.

C.

The crux of petitioner's claim H is the alleged variance between the oral and written supplemental instructions. Petitioner claims that the trial court did not provide the jury with written supplemental instructions on "good faith and duty to disclose" (doc. no. 2, p. 33, ¶ 143). Petitioner also contends that the jury was not provided with any written copy of the supplemental instructions by pointing to the jury foreman, who after trial "reviewed the jury instruction notebook, verified that it was complete, and stated that no supplemental or additional instructions had been received after deliberations began." *Id.* at 32, ¶ 142. Although not clearly specified by petitioner, he appears to allege further that the written supplemental instructions "on unauthorized acts contained the erroneous statement that good intent or motive is not a defense even though the state must prove that defendants acted purposely to establish that offense." (doc. no. 62, p. 16).

Petitioner also looks to the following to show prejudice: (1) The need to correct the record approximately two years after the verdict; (2) The trial court's violation of his right to be present and to be informed of the exact proceedings during a critical stage of trial; (3) The trial court's denial of his right to be represented by counsel. (doc. no. 2, pp. 30-35; doc. no. 67, pp. 2-4).

The Magistrate Judge has accurately set forth the legal standards for evaluating the prejudice petitioner allegedly suffered and for determining whether the prejudice denied petitioner a fundamentally fair trial (doc. no. 62, p. 14). This Court therefore adopts these statements of law and proceeds with them, as well as the following, in mind:

> Our duty then is to examine for ourselves the grounds for relief . . . , defer entirely to the [state] courts' evidence-supported findings of fact relating to each, determine for ourselves whether the 'mistakes' . . . , amounted to legal error, and then decide whether, as a result of these 'mistakes,' taken separately or in combination, 'the jury was too tainted and inflamed to be able to give the petitioner [a] fair trial . . .

Lundy, 888 F.2d at 470. "[P]rocedural due process is, in the last analysis, simply the court's notion of 'fundamental fairness . . . ,' and compliance with the principles 'implicit in the concept of ordered liberty.' " *Id.* (citations omitted).

Jury instructions containing erroneous explanations of state law do not violate the Due Process Clause. *Wood v. Marshall*, 790 F.2d 548, 551 (5th Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987). "In a habeas proceeding, allegedly

improper jury instructions must be shown to have infected the accused's trial to such a degree as to constitute a clear violation of due process." *Id.*

Having reviewed petitioner's claims of variance and prejudice de novo, this Court finds no prejudice flowing from the alleged variations or omissions. The alleged complete lack of written supplemental instructions and, more particularly, the alleged lack of a supplemental written instruction on "duty to disclose" or "good faith" caused petitioner no prejudice because the trial court instructed the jury orally on these matters (doc. no. 28, ex. 49, p. 11537). Since the instructions taken as a whole contained these elements, the jury had before it the explanation petitioner sought and therefore no prejudice inured to petitioner's defense. *Cf. Cupp v. Naugten*, 414 U. S. 141, 146 (1973) (Habeas petitioner must show "not merely that the instruction is undesirable, erroneous, or universally condemned, but that it violated some right which was guaranteed . . . by the Fourteenth Amendment."). The conclusion, moreover, provided by the Ohio Supreme Court is – upon our de novo review – well taken: Any prejudice regarding a lack of an instruction on "duty to disclose" harmed the state rather than petitioner, since as a matter of state law, petitioner was not entitled to such an instruction. *See Warner*, 55 Ohio St.3d at 56.

Accordingly, the record fails to demonstrate that the alleged variances between the oral and written supplemental instructions violated petitioner's right to a fundamentally fair trial.

Turning to the remaining types of prejudice alleged by petitioner, this Court finds no grounds for concluding

any prejudice occurred. Petitioner's claim that he was denied his right to be present at critical stages of the proceedings lacks merit, since petitioner's counsel and petitioner himself were present on February 20, 1987, when the trial court orally provided the jury with the four supplemental instructions, and since petitioner's counsel was present on February 21, 1987, during the conference when the trial court provided the jury with the supplemental written instructions. *Warner*, 55 Ohio St.3d at 57. For these reasons, petitioner also was not denied his right to counsel. Lastly, the Magistrate Judge correctly concluded, "it was not the [trial] court's refusal to disclose the written instructions, but rather the procedure that was utilized to deliver the four supplemental instructions to the jury, that created the need for reconstructing the record two years later." (doc. no. 62, p. 15). For obvious reasons, moreover, the need to correct the record after trial did not effect the validity of the jury's verdict.

Accordingly, petitioner's claim H lacks merit.

III.

Petitioner contends that the trial court violated his right to a fair and impartial jury by not granting his pretrial motion to change venue. After a thorough analysis, the Magistrate Judge rejected this claim (doc. no. 62, pp. 19-27). Petitioner contends that the Magistrate Judge erred in several respects (doc. no. 67, pp. 4-5).

Upon de novo review, this Court agrees with the Magistrate Judge's thorough analysis, and for the reasons stated by the Magistrate Judge (doc. no. 62, pp. 19-26),

adopts the following conclusions: Juror Statt's voir dire testimony establishes that she held no bias or prejudice against petitioner; her testimony also supports the trial court's determination that a fair and impartial jury could be obtained despite the extensive pretrial publicity which occurred prior to petitioner's trial. Petitioner has waived his claim regarding juror Dalton due to the Ohio Supreme Court's reliance on petitioner's procedural default in failing to file a timely motion for a new trial under Ohio Crim. P. 33(B). Petitioner has not shown "cause" for this procedural default – even though he contends that he was not aware of the facts regarding juror Dalton until after the time period for filing a motion for a new trial lapsed – because he has not explained his failure to raise this claim on his direct appeal in support of his challenge to the trial court's denial of his motion to change venue. The fact that juror Dalton's mother-in-law had an account at the Home State Savings Bank, does not establish that Dalton was a biased juror, since the account contained only $.80, and since Dalton's mother-in-law did not lose any money as a result of Home State's collapse.

Petitioner's objections to the Magistrate Judge's analysis are not well taken. The Magistrate Judge did not defer to the state courts' alleged determination that a fair trial was possible in Hamilton County, Ohio; instead, the Magistrate Judge merely listed this as one of respondent's contentions. *See* Doc. no. 62, p. 19; doc. no. 67, p. 4, ¶ 11.

The record has been expanded by petitioner, which is proper under Rule 7, Rules Governing Section 2254 Cases, to include a Hamilton County Survey dated April 1986 and a voluminous compilation of news articles

regarding petitioner.[5] Review of the record as a whole establishes that the petitioner's jury was chosen with care. The parties were meticulous in their questioning of prospective jurors. Fifty-seven jurors were rejected for cause. Each juror was questioned individually; all were properly admonished. Therefore the opinions of any single prospective juror did not taint the others. This Court finds no need for an evidentiary hearing regarding the facts allegedly not considered by the Magistrate Judge, since petitioner has not demonstrated that the truth of any facts not considered would be sufficient grounds for a writ of habeas corpus. *See Townsend*, 372 U.S. at 312. The trial court conducted a complete evidentiary hearing in this regard.

Lastly, this Court agrees with the Magistrate Judge's observation that "the jury's verdict indicates that Warner was tried by a fair and impartial jury. The amended indictment contained eighty-seven counts against Warner. Warner was convicted of only nine of those charges. Six counts on which he was convicted were for unauthorized acts . . . He was acquitted of the more serious misapplication of funds offenses, which were based on the same events." (doc. no. 62, p.27). This Court agrees with petitioner's trial counsel when he argued during closing that each and every juror, honestly and sincerely, said that they would not be affected by the treatment of Mr. Warner by the press, by the community during the panic and by the virtual firestorm of publicity that followed the

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[5] The Court notes that the record of voir dire is complete with the exception of the transcript of the proceedings on November 21, 1986.

closing of Home State Savings Bank (doc. no. 44, Ex. C, tr. 11150-51). This Court also notes that according to petitioner's trial counsel – the jury was patient, attentive, and fair minded. *Id.* at tr. 11152.

Accordingly, the Court adopts in full the Magistrate Judge's analysis and conclusions (doc. no. 62, pp. 19-27), and finds that the petitioner's claim J lacks merit.

IV.

Petitioner contends that the trial court violated his rights under the Fourteenth Amendment by instructing the jury as follows:

> In any prosecution brought under Section 1707.01 to 1707.45 of the Revised Code, the accused shall be deemed to have knowledge – to have had knowledge of any matter of fact, where in the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge.

doc. no. 2, p. 21 (citing T. 11501). Petitioner also paraphrases, in part, the following instruction: " 'Reasonable diligence' was the opposite of simple negligence: "such diligence, care or attention as might be expected from a person of ordinary prudence. . . . " *Id.*

The statute upon which the trial court based the above instructions states:

> In any prosecution brought under sections 1707.01 to 1707.45 of the Ohio Revised Code, . . . the accused shall be deemed to have had knowledge of any matter of fact, where in

> the exercise of reasonable diligence, he should prior to the alleged commission of the offense in question, have secured such knowledge.

Id. (quoting Ohio Rev. Code § 1707.29).

Petitioner contends that both the jury instructions and § 1707.29 impermissibly allowed the jury to presume the existence of petitioner's knowledge, which was an essential element of the securities counts. The Magistrate Judge found that petitioner's contentions lack merit. Petitioner objects on numerous grounds (doc. no. 51, pp. 4-6).

Upon de novo review, this Court finds that petitioner's objections are not well taken and adopts the Magistrate Judge's analysis and conclusions in full as follows: Ohio Rev. Code § 1707.29 is a definitional section, which when interpreted in the light of its history and the Ohio courts' construction, and which when explained as the trial court did in petitioner's case, required a reasonable juror to apply the "reasonable diligence" standard to ascertain facts prior to the transactions at issue. This "reasonable diligence" standard did not allow the jury to presume petitioner's knowledge. The state was not relieved of its burden of showing petitioner's mental state since it was required to produce evidence showing, beyond a reasonable doubt, that petitioner would have learned the true nature of the facts presented by him if he had exercised reasonable diligence.

Accordingly, the Court adopts in full the Magistrate Judge's analysis and conclusions (doc. no. 49, pp. 42-51), and finds that petitioner's claim that the jury instructions

violated his rights under the Fourteenth Amendment by creating mandatory presumption lacks merit.

V.

Petitioner raises numerous additional objections to both of the Magistrate Judge's Report and Recommendations. Upon a de novo review of the entire record, especially in light of petitioner's objections, the Court finds that petitioner's remaining contentions have either been adequately addressed and properly disposed of by the Magistrate Judge or present no particularized arguments that warrant specific responses by this Court. The Court finds that the Magistrate Judge has accurately set forth the controlling principles of law and properly applied them to the petitioner's remaining claims and agrees with the Magistrate Judge that petitioner's claims lack merit.

VI.

In light of the foregoing and upon de novo review of the record, this Court concludes that although petitioner's trial cannot be characterized as error-free, the record has not established that petitioner was denied his rights under the Due Process Clause to a fundamentally fair trial.

ORDER

The Court hereby ORDERS that:

(1) The two Reports and the recommendations of the United States Magistrate Judge (doc. nos. 49, 62) are ADOPTED as modified.

(2) Petitioner's motion for partial summary judgment (doc. no. 3) is DENIED.

(3) Respondent's cross motion for partial summary judgment (doc. no. 13) is GRANTED.

(4) Petitioner's application for bond pending appeal (doc. no. 50) is DENIED in light of the foregoing and since the issues petitioner raises concerning his health and other physical problems relate to the conditions of his confinement which may be addressed in an appropriate civil action but are not relevant to his petition for a Writ of Habeas Corpus.

(5) Petitioner's application for a writ of habeas corpus (doc. no. 2) is DENIED.

(6) Considering all of the foregoing as well as the parties' briefs, the Court determines pursuant to 28 U.S.C. § 2253 that probable cause to appeal this judgment exists.

This case is terminated on the docket of this Court.

IT IS SO ORDERED.

/s/ _____
Herman J. Weber, Judge
United States District Court

No. 92-4339

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARVIN L. WARNER,

Appellant,

v.

REX A. ZENT, Warden,

Appeliee.

On Appeal from the United States District Court for the Southern District of Ohio.

Before: JONES, GUY, and NELSON, Circuit Judges.

NELSON, Circuit Judge, delivered the opinion of the court, in which GUY, Circuit Judge, joined. JONES, Circuit Judge (pp. 33-44), delivered a separate opinion concurring in part and dissenting in part.

DAVID A. NELSON, Circuit Judge.

Marvin L. Warner, the petitioner in this habeas corpus case, owned a controlling interest in the corporation of which Home State Savings Bank, a Cincinnati building and loan association, was once a subsidiary. In 1985, a few months after selling an issue of debentures to the public, Home State went bankrupt. The bankruptcy was precipitated by the financial collapse of a Florida securities dealer with which both Home State and Mr. Warner had had extensive business dealings over the years and to which Home State had paid over $114 million in 1983 pursuant to a series of margin calls.

Following the demise of Home State, Mr. Warner and two co-defendants were placed on trial in an Ohio common pleas court on charges of securities fraud, willful misapplication of Home State funds, and unauthorized transfer of drafts or other written instruments belonging to Home State. The jury found Mr. Warner innocent of the majority of the charges against him, but a verdict of guilty was returned on three counts of securities fraud and six counts of unauthorized transfer. The convictions were set aside by an Ohio court of appeals, but were later reinstated by the Supreme Court of Ohio. See *State v. Warner*, 55 Ohio St. 3d 31, 564 N.E.2d 18 (1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1584, 113 L.Ed.2d 649 (1991). Mr. Warner instituted the present federal habeas corpus proceeding in 1991. The matter is before us now on appeal from a judgment in which the district court denied habeas relief.

Mr. Warner contends that the district court ought to have held that the State of Ohio violated his federal constitutional rights by (1) construing ambiguous state laws as criminalizing acts (recklessly making wire transfers of institutional funds without authorization) the forbidden character of which had not been clear at the time the acts were committed; (2) failing to give Mr. Warner fair notice, in the indictment or elsewhere, of the culpable mental state required for conviction on the unauthorized transfer charges; (3) physically delivering to the jury written instructions to which counsel were not privy, and failing to let the jury see written instructions that it should have seen; and (4) allowing the jury to find Mr.

Warner guilty of securities fraud on the basis of a conclusive presumption that he misrepresented facts "knowingly," although the proofs presented at trial only showed that he ought to have known the facts to be other than as represented.

The respondent warden, represented by a special prosecutor retained by the state, maintains that (1) Ohio law was clear on the criminality of what Mr. Warner did, and the claim of constitutional error in this respect was not preserved for habeas review in any event; (2) Mr. Warner received actual notice of the culpable mental state prescribed by statute for the unauthorized transfer offenses, and he suffered no prejudice by reason of the deficiencies of the indictment in this respect; (3) the error committed by the state trial court in refusing to let counsel see the written copy of the jury instructions which (along with 12 boxes of exhibits) went to the jury room after the jury had been instructed orally did not so prejudice the defense as to make Mr. Warner's conviction unconstitutional; the factual issues associated with the supposed failure to give supplemental written instructions, moreover, were conclusively resolved against Mr. Warner by the Ohio courts; and (4) the statutory "presumption" complained of, as set forth in Ohio Rev. Code § 1707.29, is not a presumption at all; as the Ohio Supreme Court noted, the statute "merely sets forth what the term knowledge encompasses for purposes of criminal liability. . . . " *State v. Warner*, 564 N.E.2d at 42.

Upon review of the briefs and such of the record as has been placed before us, and upon consideration of the oral arguments presented at a hearing held (at Mr. Warner's request) on an expedited basis, we conclude

that the district court did not err in denying the petition for a writ of habeas corpus. We shall therefore affirm the district court's judgment.

I

Although he was not an officer or director of Home State, Mr. Warner controlled the institution through ownership of stock in its parent company, Home State Financial, Inc. In 1977 Mr. Warner was instrumental in having Home State Savings Bank embark on what proved to be a long-term business relationship with ESM Government Securities, Inc., a small broker-dealer located in Florida. ESM became the primary broker for Home State's purchases and sales of government securities and borrowings under reverse repurchase agreements, or "repos."[1]

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[1] As explained by the Ohio Supreme Court,

"A repurchase agreement is similar to a collateralized loan, with the security subject to repurchase pledged as collateral. The repurchase agreements between Home State and ESM were of two types. In the first type of transaction, Home State 'sold' securities in its investment portfolio to ESM, subject to Home State's obligation to repurchase and ESM's obligation to convey the securities at a later date for a specified price. The funds paid by ESM to Home State for the securities in effect constituted a loan to Home State from ESM, with the securities pledged by Home State serving as collateral. Home State periodically paid interest on the borrowed funds and received the coupon interest paid on the securities. In the second type of transaction, Home State purchased securities at a discounted price, and ESM simultaneously extended to Home State a loan, collateralized by the securities purchased. Again, Home State agreed to repurchase and ESM agreed to reconvey the securities at a later date, and Home State's interest payment came due on that date. In both types of transaction, the security subject to repurchase

Over the years, Home State relied on ESM to purchase many hundreds of millions of dollars' worth of government securities for it and to provide the financing for such purchases. As noted above, Home State "sold" the securities to ESM under long term reverse repurchase agreements that represented collateralized borrowings by Home State; ESM did not necessarily retain the collateral, however, because it could sell the securities to others under new repurchase agreements.

Home State's transactions with ESM came under the scrutiny of the Ohio Division of Savings and Loan Associations, a regulatory arm of the state, and the Ohio Deposit Guarantee Fund, a private entity that insured Home State deposits. Both the Division and the Fund became concerned that Home State was giving ESM far too much collateral in relation to the amount of money borrowed. An examiner for the Division concluded in a 1982 report that Home State's overcollateralization was "unsafe and unsound." The Fund agreed, and beginning in 1982 it issued a series of directives in which Home State was told to reduce its involvement with ESM. Home

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passed into ESM's possession for the term of the repurchase agreement and could be sold by ESM to third parties under an additional repurchase agreement.

"Whether a transaction is characterized as a repurchase agreement or a reverse repurchase agreement depends on whether the transaction is viewed from the perspective of the party supplying funds or the party acquiring funds. Viewed from Home State's perspective, the transactions were reverse repurchase agreements because Home State was 'selling' securities and 'borrowing' funds rather than 'buying' securities and 'lending' funds." *State v. Warner*, 564 N.E.2d at 22, n.2.

State did not comply, and early in 1983 it entered into a $700 million reverse repo transaction with ESM.

On February 25, 1983 – apparently before it knew of the most recent transaction – the Fund sent Home State a letter saying, among other things, that:

> "We are most concerned with the extreme amount of over-collateralization of the reverse repo (borrowed money) with ESM Government Securities. As of June 30, 1982, [Home State] has borrowed money from ESM of $83.8 million and collateral assigned aggregating a market value of $177.1 million, which is $93.3 million in excess[,] or a voluminous 211.2% of the amount borrowed.
>
> * * *
>
> "This substantial over-collateralization of the borrowed money to ESM is an unsafe and unsound practice, and is completely unacceptable to the Ohio Deposit Guarantee Fund as it should be to you. This potential risk to Home State and the Fund cannot be permitted to continue.
>
> "We direct you to reduce the market value of Home State's collateral to an amount ranging from 105 to 110% of the amount borrowed from ESM. This reduction must occur as soon as possible, but in no event later than the present term of the reverse repos which, we understand, is no later than June 30, 1983."

On April 28, 1983, Home State's board of directors resolved to comply with the February 25 letter from the Fund. Evidence presented at trial indicated that the board's resolution was not subsequently modified or rescinded, "and that the board never gave anyone [including

Mr. Warner] authority to act contrary to its terms." *State v. Warner*, 564 N.E.2d at 24.

The market value of the government securities purchased by Home State declined in 1983, and, pursuant to the repurchase agreements, Home State received a series of margin calls. Between May of 1983 and October of that year ESM made 41 margin calls totaling more than $114 million. Home State honored each of these margin calls, notwithstanding that the institution was thereby violating the April 28 resolution of its board of directors.

Mr. Warner personally approved the honoring of the last six margin calls, pursuant to which a total of $12.2 million was transferred from Home State to ESM by wire. The payments on the six margin calls in question, made between August 29 and October 14, 1983, constituted the "unauthorized transfers" for which Mr. Warner was ultimately convicted.

The securities fraud charges against Mr. Warner arose out of Home State's sale of a multi-million dollar debenture issue in 1984. Home State Financial, the parent corporation, needed to raise almost $30 million to retire maturing debt. The parent corporation filed a registration statement with the Securities and Exchange Commission for a new issue of debentures, but the SEC, concerned about the ESM situation, did not permit the proposed offering to go forward. This problem was circumvented through the stratagem of merging the parent into the subsidiary. The surviving company – a financial institution exempt from SEC registration was – able to issue the debentures without registration.

The offering circular for the new issue of debentures was reviewed and revised by Mr. Warner personally. The circular greatly overstated the value of Home State's assets. It also incorporated by reference certain reports that contained misstatements as to Home State's relationship with ESM.

Early in 1985 Mr. Warner and Home State learned that ESM had sustained huge losses. These losses – which ESM had been covering up in financial statements which it falsified with the complicity of a corrupt certified public accountant – amounted to some $300 million. ESM filed a petition in bankruptcy on March 4, 1985, and Home State closed its doors four days later. The value of the government securities that Home State then had at risk as a result of its transactions with ESM was approximately $140 million. The Ohio Deposit Guarantee Fund could not cover a loss of that magnitude, and the Governor of Ohio temporarily closed all financial institutions insured by the Fund. It was in the wake of this state-wide crisis that Mr. Warner and two former presidents of Home State, David J. Schiebel and Burton M. Bongard, were indicted in December of 1985.

In addition to four charges of securities fraud, one of which was dismissed by the court prior to trial, the indictment contained 41 counts in which the defendants were charged with violations of Ohio Rev. Code § 1153.01. That statute reads as follows:

> "No president, director, trustee, committee member, secretary, treasurer, attorney, or other officer or agent of a building and loan association shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the

> association; nor shall he issue or put into circulation a warrant or other order, or assign, transfer, cancel, or deliver a note, bond, draft, mortgage, judgment, decree, or other written instrument belonging to the association, or raise or receive money for and in the name of such association, unless authorized to do so by its board of directors."

Each of the 41 counts involving § 1153.01 charged that the defendants, acting "with the intent to injure or defraud the Bank," violated the statute by (a) willfully misapplying, through transfer to ESM, monies, funds, or credits of Home State; (b) failing to obtain the return of the funds, which was also alleged to constitute willful misapplication; and/or (c) assigning, transferring or delivering notes, bonds, drafts or other written instruments belonging to Home State without the authorization of the institution's board of directors.

Contending that these counts were duplicative – *i.e.*, that they violated the rule against charging more than one offense in a single count – the defendants moved that the state be required to make an election among the duplicative charges. In briefing this motion Mr. Warner and his co-defendants told the common pleas court that Ohio Rev. Code § 1153.01 "plainly encompasses more than the single offense of 'misapplication.' " The defendants went on to explain that

> "Misapplication is only one of two offenses encompassed in the section; the other offense consists of taking certain actions without authorization of the board of directors. The 'misapplication' offense is specified in the portion of the section before the semicolon; the

> 'unauthorized acts' offense is specified in the portion of the section after the semicolon."

Unauthorized acts offenses, the defendants added, "clearly are broader than the offenses of embezzlement, abstraction, and willful misapplication created in the first part of the section; significantly, no 'conversion or taking' is required by the 'unauthorized acts' provision."

The common pleas court agreed with the defendants' reading of the statute. The court did not order an election, however, but directed instead that the charges be severed. The indictment was then amended so that each of the 41 original counts based on the honoring of the 41 margin calls was split into two separate counts. The odd-numbered counts charged willful misapplication, and the even-numbered counts charged unauthorized transfer. The allegation that the defendants acted with intent to injure or defraud was retained in each one of the 82 new counts, notwithstanding that under the reading of the statute urged by the defendants and accepted by the court, the mere transfer of assets without board authorization (the offense created by the language following the semicolon) did not entail a conversion or willful taking of assets.

In August of 1986 the state filed proposed jury instructions regarding the § 1153.01 counts. As to the unauthorized transfer offenses, the state proposed abandoning the "intent to injure or defraud" rubric used in the indictment. It proposed instead that the jury be told that in order to find the defendants guilty of the unauthorized transfer charges it would have to find that the defendants acted "knowingly." The defendants

opposed this suggestion, filing a brief in which they argued that the jury instructions should track the language of the indictment.

The mental state required for conviction on the unauthorized transfer charges was discussed at a pretrial hearing conducted by the trial judge in November of 1986. The issue was not definitively resolved at this conference, but the judge explicitly questioned whether intent to injure or defraud was the appropriate mental state for a crime created by a statute that did not specify such intent.

On December 4, 1986, shortly before the selection of the jury began, the trial judge invited the parties' attention to Ohio Rev. Code § 2901.21(B). Section 2901.21(B) reads as follows:

> "When the section defining an offense does not specify any degree of culpability, and plainly indicates [sic] a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. *When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.*"

(Emphasis supplied.) The judge expressed the view that because the unauthorized transfer language of § 1153.01 "does not specify any degree of culpability nor plainly indicates a purpose to impose strict liability," proof of recklessness would suffice to establish criminal liability. The judge said that his decision on this point was not final, and he invited further briefing on the question.

Neither Mr. Warner nor either of the other defendants asked that a definitive ruling be made before the start of the trial. No one requested a continuance. When the trial began, it is fair to say, the defendants not only had actual knowledge of the contents of the Ohio Rev. Code § 2901.21(B), they had actual notice that the judge might well instruct the jury, pursuant to this statute, that the culpable mental state for the unauthorized transfer offenses was "recklessness."[2]

During the presentation of the state's case, the trial judge did precisely what he had spoken of doing. In a cautionary instruction delivered prior to the testimony of one of the principals of ESM, the jury was told that as far as the crime of transfer without authorization from the

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[2] Ohio Rev. Code § 2901.22(C) gives the following explanation of the term:

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

"Recklessness" is a higher degree of culpability than mere negligence. See Ohio Rev. Code § 2901.22(D):

> "A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist."

board of directors was concerned, "[t]he culpable mental state is recklessness."[3] Mr. Warner's attorney objected that the instruction was erroneous, but, not surprisingly, made no claim of surprise.

The trial, which had begun early in December of 1986, continued into February of 1987. A jury charge conference was held on February 13, 1987, at which time the instructions relating to the § 1153.01 counts were discussed. By that time the state had filed a brief supporting a "recklessness" *mens rea* for the unauthorized transfer counts, and the defendants had filed an opposing brief. Although Mr. Warner's counsel argued at the charge conference that it would be a denial of due process not to instruct the jury that the crime of willful misapplication requires intent to injure or defraud, no such constitutional argument was presented with respect to the unauthorized transfer counts.

On February 17, 1987, the day before the presentation of closing arguments, the judge confirmed to counsel that the jury would be given "recklessness" instructions in connection with the unauthorized transfer counts. In the closing arguments that followed, the prosecutor contended that Mr. Warner had been reckless in acting as the *de facto* chief executive of Home State without bothering to read the board resolutions that were sent to him. The argument presented in response was that Mr. Warner learned on August 29, 1983, of the resolution adopted by the board on April 28; that he immediately issued a

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[3] The court reporter transcribed the last word as "requisite," but the transcript of the ensuing bench conference shows that the judge must have said "recklessness."

memorandum directing that no further margin calls be honored without his approval; and that it was not reckless for him to assume that officers who had been meeting margin calls for years continued to have board authorization to do so.

On February 20, 1987, following the completion of the parties' oral arguments, the trial court gave a comprehensive and balanced set of oral instructions to the jury. With respect to the unauthorized transfer counts the jury was told that the offense could not be established without proof beyond a reasonable doubt that the defendants acted "recklessly." The court went on to explain that "[a] person is reckless with respect to circumstances when, with heedless indifference to the consequences, he or she perversely disregards known risk that such circumstances are likely to exist."

In the instructions relating to the securities fraud counts the jury was given a detailed explanation of Ohio Rev. Code § 1707.29. That statute provides that in prosecutions for securities fraud, "the accused shall be deemed to have had knowledge of any matter of fact, where in the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge."

At the conclusion of its explanation of Ohio Rev. Code § 1707.29, and after defining "reasonable diligence," the trial court gave these instructions:

> "Thus . . . a person is criminally liable if he represents facts to be different than he should have known them to be if he had exercised reasonable diligence to ascertain the facts.

> "On the other hand[,] of necessity, a good faith belief in facts which he should have know[n] to be otherwise had he exercised reasonable diligence to ascertain the true state of facts."

Objections to the jury instructions were heard in chambers before the jury retired to deliberate. Referring to the incomplete sentence at the end of the passage quoted above, Mr. Warner's counsel noted that the court had skipped a line in charging on good faith belief in connection with Ohio Rev. Code § 1707.29. Warner's counsel also renewed his objection to the charge on recklessness, but did not assert that it was unconstitutional. No issue was raised, either at this point or at any other stage of the trial proceedings, as to whether a wire transfer could violate the prohibition against unauthorized transfer of a "draft" or "other written instrument."

Following the conference in chambers, and before the jury was sent to deliberate, the court gave several supplemental instructions. In these charges the jury was told that savings and loan associations are permitted to invest in government securities; that the motives of a witness may be considered in weighing his testimony; and that charges of securities fraud based on nondisclosure may not be sustained in the absence of a duty to disclose. The court also supplemented its instruction on Ohio Rev. Code § 1707.29, telling the jury that "if the defendant had a good faith belief in the existence of the facts represented, and acted in accordance with the facts as he believed them to [be], he is not guilty of selling securities fraudulently, as his knowledge is an essential element of that crime."

The voluminous body of paper placed in the jury room when the jury retired included a binder containing a written version of the jury instructions. Both the prosecutor and counsel for the defendants requested permission to examine the contents of the binder; inexplicably, however, permission to do so was refused.

The binder did not include copies of the four supplemental instructions. This omission was the subject of discussions between the court and counsel on the morning of February 21, 1987, and it appears that the supplemental instructions were retyped by a court reporter and taken to the jury room by a constable soon thereafter. No one objected to this procedure.

The jury returned its verdict on March 2, 1987. Mr. Warner was found guilty on all three of the securities fraud charges and on the last six of the unauthorized transfer charges. He was found not guilty on the first 35 unauthorized transfer charges and on all of the 41 willful misapplication charges. The court denied a post-verdict motion for acquittal and sentenced Mr. Warner to a term of imprisonment which, as of this writing, has only a matter of weeks still to run.

Mr. Warner perfected an appeal to the state court of appeals, which reversed the convictions in an unpublished opinion issued in November of 1989. As stated above, the Ohio Supreme Court reversed the court of appeals decision and reinstated the convictions. A motion to reconsider was denied for the most part, the Ohio Supreme Court making no changes in its decision

other than one relating to restitution. A petition for certiorari was subsequently denied by the Supreme Court of the United States.

The present habeas corpus proceeding was commenced in the United States District Court for the Southern District of Ohio in July of 1991. The matter was referred to Magistrate Judge Robert A. Steinberg, who in March of 1992 filed a comprehensive report and recommendation on cross-motions in which the parties had sought partial summary judgment. A second report and recommendation followed in April. Both reports were adverse to Mr. Warner, and he filed timely objections. In November of 1992 the district court (Herman J. Weber, J.) adopted the magistrate judge's reports and recommendations with some modification and entered judgment denying Mr. Warner's petition for a writ of habeas corpus. This appeal followed.

II

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," the Supreme Court declared in striking down an early state-law version of the Davis-Bacon Act, "violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). This "void for vagueness" doctrine, as it is sometimes called, was given the following formulation in *United States v. Harriss*, 347 U.S. 612, 617 (1954):

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give

> a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." (Footnote omitted.)

This principle applies with particular force, the Supreme Court has said, "where . . . a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction. . . . " *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). "Indeed," the *Bouie* court continued, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids." Id. at 353. See generally *United States v. Salisbury*, 983 F.2d 1369, 1377-80 (6th Cir. 1993), where other decisions in this line of authority are marshalled.

Mr. Warner submits that in placing a construction on Ohio Rev. Code § 1153.01 that criminalized his transfers to ESM, the Ohio courts worked "an unforeseeable judicial enlargement" of the statute. The courts enlarged the statute, he says, in two ways: (1) by interpreting it to include unauthorized transfers made "recklessly," as opposed to those made with intent to injure or defraud; and (2) by interpreting it to include *wire* transfers, as opposed to transfers of what the statute calls a "draft . . . or other *written instrument*. . . . " (Emphasis supplied.)

The district court found that both branches of Mr. Warner's statutory enlargement argument had been waived as a result of failure to present them to the state

courts. Where state courts have not been given a fair opportunity to examine a federal constitutional argument, it is clear, federal habeas relief may not be predicated thereon unless the petitioner can demonstrate either (1) cause for the default and actual prejudice resulting from the alleged constitutional error, or (2) a fundamental miscarriage of justice. *Coleman v. Thompson*, 111 U.S. 2546 (1991).

The district court may or may not have been correct in holding here that Mr. Warner's statutory enlargement argument was waived. For purposes of this appeal, however, we shall assume, without so holding, that there was no waiver. The merits of the argument seem relatively straightforward, and it will simplify our task if we come to grips with them directly.

A

The Ohio statutes, as we read them, would not suggest to anyone of common intelligence that a building and loan association agent who, without authorization by the board of directors, recklessly transferred a draft belonging to the association would not have to worry about criminal liability as long as he had no intent to injure or defraud. Nothing in the portion of ORC § 1153.01 that prohibits unauthorized transfers says anything at all about a culpable mental state. The unauthorized transfer portion may not indicate a purpose to impose strict liability, but neither does it specify that there can be no offense without proof of intent to injure or defraud.

The law that applies in such a situation, as the state trial court recognized, is found in the last sentence of Ohio Rev. Code § 2901.21(B): "When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." The Supreme Court of the United States had occasion to quote this provision in *Osborne v. Ohio*, 495 U.S. 103, 112, n. 9 (1990), where the Court noted that "Ohio law provides that recklessness is the appropriate *mens rea* where a statute 'neither specifies culpability nor plainly indicates a purpose to impose strict liability.' "

Mr. Warner argues that he could not have been expected to foresee the state trial court's holding as to the appropriate *mens rea* because Ohio Rev. Code § 1153.01 does in fact specify culpability when it says that no agent of a building and loan association shall misapply any funds of the association "willfully." The answer to this argument, however, is the one that Mr. Warner himself suggested in the state common pleas court. Warner submitted there that § 1153.01 "plainly" encompasses two separate offenses – a willful misapplication offense specified by the portion of § 1153.01 that appears before the semicolon, and an unauthorized acts offense specified by the portion of the section that appears after the semicolon. The latter offense is "clearly" broader than the former, as Mr. Warner successfully argued in the common pleas court. It is no less clear, under the plain language of the statute, that a person can commit the unauthorized acts offense without acting willfully. As the Ohio Supreme Court put it, "there is no way to construe the second clause of the statute to impose [a 'willful' or 'purposeful' state of mind] requirement for conviction for

unauthorized acts." *State v. Warner*, 564 N.E.2d at 48. And it was unauthorized acts offenses, not willful misapplication offenses, of which Mr. Warner was convicted.

It is true, to be sure, that the portion of § 1153.01 that comes before the semicolon and the portion that comes after the semicolon are both parts of the same statutory section. In common parlance, however, the words "section" and "portion" are used interchangeably all the time. The section of § 1153.01 appearing after the semicolon defines the only relevant offense of which Mr. Warner was convicted, and that section does not specify culpability. It was neither unreasonable nor unconstitutional, under these circumstances, for the Ohio courts to apply the word "section," as used in Ohio Rev. Code § 2901.21, to the section of Ohio Rev. Code § 1153.01 that defines the offense of which Mr. Warner was determined to be guilty.

B

Mr. Warner has a somewhat stronger case on the merits of the second branch of his statutory enlargement argument. This branch of the argument, it will be recalled, is that it was unforeseeable, in 1983, that a wire transfer could be equated with the transfer of a draft or other "written" instrument.[4]

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[4] Both Magistrate Judge Steinberg and District Judge Weber concluded that Mr. Warner waived this claim by failing to assert it in the state courts. Mr. Warner did file a post-verdict motion for acquittal in which he argued as a matter of state law that wire transfers do not come within the ambit of Ohio Rev. Code § 1153.01, and the state law argument was considered by all three of the Ohio courts to which the case came. Mr. Warner may

Mr. Warner cannot prevail on this claim without persuading us that the Ohio Supreme Court's construction of Ohio Rev. Code § 1153.01 was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," *Bouie, supra*, 378 U.S. at 354, or that it was impossible to ascertain that the legislature meant one thing rather than another, and that the proposed interpretation would be as likely to defeat the purpose of the legislature as to promote it. See *Connally, supra*, 269 U.S. at 394. We are not so persuaded.

The only law that had been expressed prior to the conduct in issue here was the law established in the statute itself; there were no reported decisions on point as of the time of Mr. Warner's transfers to ESM. The statute itself, as we read it, was perfectly clear in saying that a "draft" belonging to a building and loan association was not to be transferred or delivered without board authorization. The most common example of a draft is an ordinary bank check, of course, and in the experience of most of us – if not in the experience of sophisticated businessmen – bank drafts are always written instruments. The

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or may not have made a fair presentation of the proposition that the federal Constitution prohibits the application to him of the interpretation which two of the three Ohio courts were to place on the statute. In accepting Mr. Warner's reading of the "written instrument" language of § 1153.01, however, the Ohio Court of Appeals relied in part on the practice of "lenity." That practice is based, the court said, "upon the principle, derived from the Due Process Clause, that an individual should not be placed in the position of speculating on whether his conduct is prohibited." (*State v. Warner*, No. C-870222, slip op. at 58-59, 1989 WL 136396 at *24.) The Ohio Court of Appeals having addressed the Due Process Clause issue, we shall do the same.

authors of Ohio Rev. Code § 1153.01 undoubtedly assumed that any check or draft transferred or delivered in violation of the statute would be a written instrument, for otherwise they would not have used the words "other written instrument" in the catch-all phrase at the end of the laundry list that includes the word "draft."

It was by no means unforeseeable, however, that the Supreme Court of Ohio would conclude, as it did, that the assumption manifested by the authors of § 1153.01 was not a requirement of the statute. Read literally, Ohio Rev. Code § 1153.01 prohibits the unauthorized transfer of *any* draft belonging to a building and loan association, regardless of whether the draft happens to take the form of a written instrument. And in this day and age, when electronic transfers have become commonplace, anything other than a literal reading of the statute would be far likelier to defeat the purpose of the legislature than to promote it. As the Ohio Supreme Court explained in *State v. Warner*, 564 N.E.2d at 47,

> "In today's modern banking environment, electronic transfers have become commonplace. On an average day, six hundred billion dollars in funds are transferred by wire or electronic means. This vastly exceeds the amount transferred by check. . . . [U]nder modern day conditions, transferring assets of a savings and loan association over the Fedwire is the equivalent of sending a check or issuing a draft.

Through R.C. § 1153.01, the General Assembly clearly intended to criminalize the unauthorized transfers of an association's assets regardless of form." (Footnote and citations omitted.)

We simply cannot accept the notion that although someone in Mr. Warner's position could reasonably have understood that it would be against the law to send ESM unauthorized drafts for $12.2 million if the drafts were written on paper, he could not reasonably have understood that it would be against the law to transmit unauthorized drafts for $12.2 million if the drafts were in paperless form.[5]

C

This is a convenient place for us to address a leitmotif in Mr. Warner's briefs that is not exactly part of his statutory enlargement argument, but that may help illuminate it.

Mr. Warner maintains that the real reason he was placed on trial and convicted was not that he used Home State's funds to cover the association's investments without advance approval from the board of directors. No one had ever been convicted of this crime before, Mr. Warner says, suggesting that while the transfers may have been *malum prohibitum*, they were hardly *malum in se*. The real reason for the prosecution and conviction, we are told,

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[5] Mr. Warner asks us to hold that because the words "moneys, funds or credits" were used in the section prohibiting willful misapplication and not in the section prohibiting unauthorized transfer, it would be unconstitutional to read the statute as prohibiting non-willful but unauthorized transfers of moneys or funds. The argument is not persuasive. The use of the word "draft" obviated any need to speak of moneys or funds, because the transfer of a draft is the way in which the transfer of moneys or funds is normally accomplished.

was that the collapse of Home State and the statewide crisis that followed the collapse produced "great public pressure to charge and convict him of something, to fix blame for the near failure of the state banking system."

There is, of course, an element of truth in this. If ESM had not been run by men who were dishonest, and if interest rate fluctuations had taken a different course in the early 1980s, Home State might not have collapsed; and if Home State had not collapsed, it is highly unlikely that Mr. Warner – a prominent businessman and former United States ambassador – would have been prosecuted for anything.

It is also true, as is evidenced by the difficulty the prosecutors had in drawing the indictment, that the charges brought against Mr. Warner under Ohio Rev. Code § 1153.01 were somewhat technical in nature. There may be an air of unreality, moreover, in the kind of analysis prescribed by the caselaw for determining whether statutes such as Ohio Rev. Code §§ 1153.01 and 2901.21(B) give a person of ordinary intelligence fair notice of what the statutes forbid. In today's world, where business people are subject to extraordinarily complex statutory rules at all levels of government, it may be doubtful whether a person in Mr. Warner's position would even have known of the existence of the statutes in question, much less spent any time cogitating about arcane distinctions between negligence and recklessness or between written instruments and paperless drafts.

This said, however, the fact remains that Home State did collapse, causing inconvenience and hardship to depositors throughout the State of Ohio. The fact remains

that a jury did find, in a trial that was not fundamentally unfair, that Mr. Warner repeatedly transferred Home State drafts for millions of dollars in violation of Ohio Rev. Code § 1153.01, thereby committing felonies of the fourth degree. And the fact remains that whatever Mr. Warner may actually have known about the statutes of which he was charged with knowledge, he undoubtedly knew, or should have known, that large Home State drafts were being transferred, first at his sufferance and then at his direction, in the context of banking practices that were obviously unsafe and unsound. The jury was instructed that it is not a crime to make bad investments, or to ignore regulatory requirements and advice in conducting the affairs of a building and loan association, but in considering whether Mr. Warner acted recklessly in making transfers without board authorization the jury was certainly not required to shut its eyes to how Mr. Warner was in fact operating.

III

The Sixth Amendment of the United States Constitution, which has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides among other things that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . . " Was Mr. Warner adequately informed of the "nature and cause" of the accusations made against him in the Ohio common pleas court?

The original indictment, as fleshed out in July of 1986 by a bill of particulars, was nothing if not specific. Mr.

Warner was told that he was accused of having made 41 unauthorized transfers to ESM. He was told the date of each transfer and the amount of money involved in each. He was told that Home State's board of directors had authorized none of the transfers. He was told that each transfer contributed to a gross overcollateralization of Home State's repurchase transactions at ESM. He was told that each transfer contravened a resolution adopted by Home State's board of directors on April 28, 1983, prohibiting overcollateralization. And he was told, of course, that each transfer violated Ohio Rev. Code § 1153.01.

If Mr. Warner had been told nothing more than this about the nature and cause of the accusations against him, he would have had little about which to complain here. Under Ohio law "[i]t is not necessary to set forth the specific degree of culpability in an indictment where the statute fails to do so and it can readily be gleaned by reference to other statutes or case law." *State v. Warner*, 564 N.E.2d at 49. The Supreme Court of the United States, similarly, has said that "[i]f the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent." *United States v. Behrman*, 258 U.S. 280, 288 (1922). Where there is an implied requirement of specific intent and the indictment is silent as to the mental state of the accused, the silence of the indictment on this point cannot invalidate a conviction, under federal law, as long as the jury has been properly instructed on the requisite mental state. See *United States v. Fusaro*, 708 F.2d 17, 23 (1st Cir.), *cert. denied*, 464 U.S. 1007 (1983).

The circumstance which Mr. Warner seeks to turn to his advantage here, of course, is that the amended version of his indictment was *not* silent as to his mental condition. The amended indictment affirmatively alleged, with respect to each of the 41 unauthorized transfer counts, that Mr. Warner acted "with the intent to injure or defraud the Bank." If the state had been required to prove such an intent, it is entirely possible that Mr. Warner would not have been convicted on any of the unauthorized transfer counts – and by affirmatively suggesting to him that it was undertaking to prove a *mens rea* that it was not ultimately required to prove, Mr. Warner argues, the state "misled [him] into fatally undermining his own case."

Like the magistrate judge and the district judge, we are satisfied that Mr. Warner was not misled into undermining his own case. His lawyers were fully capable of reading the applicable statutes – reading them more accurately, indeed, than the prosecutors did at first -- and Warner's counsel recognized from the outset that the *mens rea* specified in Ohio Rev. Code § 1153.01 for misapplication offenses did not extend to unauthorized transfer offenses. Offenses of the latter type, as Mr. Warner's counsel told the common pleas court in urging that an election be required, are clearly broader than offenses of the former type.

Mr. Warner told the magistrate judge that the motion to elect would not have been made at all if counsel had known that it would result in separate charges involving a significantly lower *mens rea*. This may be so, but it is beside the point. The object of the motion was to have the charges of unauthorized transfer dropped from the

indictment altogether, leaving no charges under § 1153.01 except for charges of willful misapplication. This object was not achieved, and Warner's lawyers may have concluded, in hindsight, that the original indictment would have suited them better than the amended indictment. But as the magistrate judge pointed out, "many motions would not be filed if the moving party knew beforehand that the outcome would be unfavorable." The failure of Mr. Warner's motion to achieve its goal hardly demonstrates prejudice.

We shall not take the time here to discuss Mr. Warner's other claims of prejudice. We have examined them carefully, and, like the magistrate judge and the district court, we find them unpersuasive.

The situation presented in this case is not one in which prejudice may be presumed. Mr. Warner had actual knowledge, before the jury was empaneled, that when a section of Ohio law defining an offense neither specifies culpability nor imposes strict liability, Ohio Rev. Code § 2901.21 says in so many words that "recklessness is sufficient culpability to commit the offense." We know that Mr. Warner had actual knowledge of § 2901.21, because we know that the judge who was going to try his case expressly called it to his lawyers' attention. Mr. Warner's hopes may well have been buoyed by the failure of the prosecutors to embrace the judge's reading of the law sooner than they did, but the fact that the prosecutors and the trial judge ultimately proceeded under a correct interpretation of the law can hardly have come as any *surprise* to Mr. Warner, disappointing to him though it may have been.

There is a wealth of federal caselaw to the effect that overstatement of the pertinent *mens rea* in an indictment is "mere surplusage" that neither obligates the prosecutor to prove more than the law requires nor obligates the trial judge to misinstruct the jury. See, *e.g.*, *United States v. Liparota*, 735 F.2d 1044, 1048 (7th Cir. 1984), *rev'd. on other grounds*, 471 U.S. 419 (1985), citing *United States v. Greene*, 497 F.2d 1068, 1086 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *United States v. Holmes*, 594 F.2d 1167, 1173 (8th Cir.), *cert. denied*, 444 U.S. 873 (1979); *United States v. England*, 480 F.2d 1266, 1269 (5th Cir.), *cert. denied*, 414 U.S. 1041 (1973). *Cf. Nichamin v. United States*, 263 F. 880, 881 (6th Cir. 1920).

A relatively recent Sixth Circuit decision is instructive here. In *United States v. Hathaway*, 798 F.2d 902 (6th Cir. 1986), a federal jury found the defendant guilty of mail fraud. The indictment had charged that the defendant "well knew" that his representations were false, but when it came time for trial the government was allowed to go to the jury on a "reckless indifference" instruction. *Id.* at 910. This court held that the variance did not amount to a constructive amendment of the indictment. A constructive amendment would have been deemed prejudicial per se, but reversal was not required in the absence of such an amendment, the *Hathaway* court said, unless the defendant could show (as Mr. Hathaway could not show) "prejudice to his ability to defend himself at trial, to the general fairness of the trial, or to the indictment's sufficiency to bar subsequent prosecutions." *Id.* at 911, quoting *United States v. Miller*, 471 U.S. 130, 138 n. 5 (1985).

In the case at bar Mr. Warner has shown no prejudice to his ability to defend himself at trial. He has shown no prejudice to the general fairness of his trial, and no prejudice to the sufficiency of the indictment to bar subsequent prosecutions. He did not make any claim of prejudice at the time of trial, and as far as we can see he has no basis for requesting an evidentiary hearing on the point. The assignment of error in respect of Mr. Warner's constitutional right to be informed of the nature and cause of the accusation against him is not well taken.

IV

A

The defendant in a criminal trial has a constitutional right to be present at all critical stages of the trial. See *Rushen v. Spain*, 464 U.S. 114, 117 (1983). The Supreme Court of Ohio held that Mr. Warner and his co-defendants were effectively denied this right when a written version of the trial court's oral instructions was given to the jury without the defendants being allowed to inspect it. *State v. Schiebel*, 55 Ohio St.3d 71, 85, 564 N.E.2d 54, 70 (1990), *cert. denied*, 111 U.S. 1584 (1991). Counsel for the respondent does not challenge the proposition that the error was of constitutional dimension.

If the error had occurred in a federal trial court, it might be arguable – although we obviously do not decide the point – that reversal on appeal would be virtually automatic, regardless of whether the defendant could show that the error caused any significant prejudice. Mr. Warner was tried in a state court, however, and the Supreme Court of the United States has denied certiorari.

The Ohio Supreme Court's reinstatement of the conviction thus represents a final judgment that is no longer subject to direct review in the Supreme Court of the United States. (The judgment would never have been subject to direct review in our court, of course.) Our only role – and the only role now left to the United States Supreme Court, should it elect to review our decision – is to determine whether the "extraordinary" remedy of habeas corpus should be granted here. See *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993).

The role of the federal courts in making such determinations is one that the Supreme Court has described as "secondary and limited." *Id.*, quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). "[H]abeas corpus is not intended as a substitute for appeal," *Wright v. West*, 112 S. Ct. 2482, 2490 (1992) (opinion of Thomas, J.), and "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *United States v. Addonizio*, 442 U.S. 178, 184 (1979).

The magistrate judge concluded, in the case at bar, that the error committed by the state trial court constituted "ordinary trial error" for which habeas relief could not be granted unless Mr. Warner could sustain "the burden of establishing that the trial court's refusal to supply the parties with copies of the written jury instructions deprived him of a fair trial." The district judge, similarly, held that the error was not cognizable in federal habeas proceedings "in the absence of clear prejudice." No such prejudice was found to have occurred.

We are not certain that this particular error fits squarely within the category of constitutional violations

that the Supreme Court has characterized as "trial error." See *Brecht, supra,* 113 S. Ct. at 1717. Having read both the transcript of the oral instructions given in open court and the written version set forth in the joint appendix, however, we are satisfied that there are no prejudicial discrepancies with respect to any of the counts on which Mr. Warner was convicted. The error committed by the state trial court in not allowing counsel to see the written copy of the jury charge bears little resemblance to the kind of "structural defect" – deprivation of the right to counsel, for example – that infects the entire trial process, thereby necessitating relief automatically. See *Brecht, op. cit.*

Under these circumstances, it seems to us, the appropriate test is the one prescribed by *Brecht* and *Kotteakos v. United States,* 328 U.S. 750, 776 (1946); that is, whether the error "had substantial and injurious effect or influence in determining the jury's verdict." A more stringent test would conflict, we believe, with the principles of federalism and comity that inform the Supreme Court's habeas corpus jurisprudence. And if we are correct in thinking that the *Brecht/Kotteakos* test is the one that applies here, we see no legitimate basis for granting Mr. Warner the relief he seeks. Warner clearly suffered no actual prejudice by reason of his failure to see the written version of the jury instructions.

B

As mentioned previously, the set of written instructions sent to the jury room in the first instance did not include copies of the four supplemental instructions delivered orally on the afternoon of February 20, 1987,

following the in-chambers conference at which the parties presented their objections to the main body of the charge. The next morning, a Saturday, counsel discussed the omission with the trial judge in his chambers. Affidavits subsequently filed with the trial court in support of a motion to supplement the record give the following account of what happened next.

One of Mr. Warner's attorneys handed copies of three or four instructions to a court reporter, who retyped them and gave a copy to the judge. The judge instructed a constable to deliver the instructions to the jury room. The constable did so, placing the instructions on a table during a break and telling the jurors as a group that "there were some additional jury instructions for them to consider along with the ones that were in the binder which had been given to them the afternoon before." After the jury returned its verdict, which was not until March 2, 1987, the court reporter went to the jury room to collect the exhibits. There she discovered a "chaotic" situation, with members of the press fishing through boxes and wastepaper baskets. The court reporter collected what she could, but while she was en route to the clerk's office the cart on which she was carrying the papers tipped over. When the record was finally assembled in the clerk's office, the original copies of the typed instructions were not to be found.

It was the state that filed the motion to supplement the record. Mr. Warner opposed the motion. In this connection he filed affidavits in which two of the jurors stated that they had no recollection of the constable's bringing them any additional written instructions.

The trial court granted the motion to supplement, finding as a fact that the typewritten copies of the supplemental instructions were delivered to the jury room on Saturday, February 21, 1987. The judge who granted the motion in Mr. Warner's case was not the same judge who had presided at the trial. However, the judge who had presided at the trial granted a similar motion in codefendant Schiebel's case. The latter judge likewise found as a fact that written copies of the supplemental instructions were taken to the jury room and left there by the constable. The Ohio Supreme Court accepted these findings as true, since they were supported by competent, reliable evidence and the trial court was not shown to have abused its discretion. See *State v. Schiebel*, 564 N.E.2d at 66-68.

The respondent warden argues here that the findings as to the supplemental instructions are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). As required by § 2254(d)(2), (3) and (6), we understand the respondent to say, the state court's factfinding procedures were adequate to afford a full and fair hearing, the material facts were adequately developed, and the petitioner received a full, fair and adequate hearing. See *Lundy v. Campbell*, 888 F.2d 467, 469 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990) ("complete deference [must be accorded] to evidence – supported state court findings of fact"). The respondent's argument is consistent with the conclusion of the magistrate judge, whose view it was that the federal courts must defer to the determination by the Ohio Supreme Court that the correcting of the record did not represent an abuse of discretion.

The district judge was of the opinion that Mr. Warner waived his right to raise the supplemental instruction issue in a habeas corpus proceeding "by failing to object to the trial court regarding the procedure used to provide the jury with the supplemental jury instructions and by failing to ask the trial court to present the written supplemental instructions to the jury on the record." The district court then went on to hold, after a *de novo* review, that no prejudicial error of constitutional magnitude had been demonstrated in any event.

We shall not pause to address the waiver issue, because our review of the materials placed before the district court persuades us that while the hearing in the common pleas court on the merits of the motion to correct the record was a hearing by affidavit only, the circumstances were such that the hearing met the criteria specified in 28 U.S.C. § 2254(d). We take it as given that if there had been an oral hearing at which Mr. Warner called members of the jury to testify, at least two jurors would have testified that they did not remember seeing any supplemental written instructions. Such testimony, however, would not directly contradict the strong showing made by the state that the supplemental instructions were in fact delivered.

The factual findings of the common pleas court must be presumed to be correct, under 28 U.S.C. § 2554(d), and we must assume, as did the Ohio Supreme Court, "that all four disputed supplemental instructions were reduced to writing and given to the jury." *State v. Schiebel*, 564 N.E.2d at 67. With this assumption, we have no hesitancy in rejecting Mr. Warner's claim of prejudice with respect to the jury instructions.

V

The Due Process Clause of the Fourteenth Amendment requires a state to prove beyond a reasonable doubt every fact necessary to constitute the offense charged. See *In re Winship*, 397 U.S. 358, 364 (1970). A trial court may not give a jury charge which shifts to the defendant the burden of proving a critical fact in dispute, see *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975), nor may a court instruct a jury that proof of the existence of certain facts automatically establishes the element of intent where intent is an element of the charged offense. *Sandstrom v. Montana*, 442 U.S. 510, 523-24 (1979).

Within constitutional limits, however, a state has discretion to determine the elements of state offenses. See *Patterson v. New York*, 432 U.S. 197, 210 (1977). On habeas review, we are bound by state court interpretations of state criminal law except in extreme circumstances where it appears that the interpretation is an obvious subterfuge to evade consideration of a federal issue. See *Mullaney*, 421 U.S. at 690-91 and n. 11.

Ohio Revised Code § 1707.29 – the statute under which the jury was instructed that Mr. Warner should be deemed to have knowledge of any fact of which he should have secured knowledge in the exercise of reasonable diligence – has a heading that reads "Presumption of Knowledge." Such headings, however, do not constitute any part of Ohio law. Resort to a title in construing a statute is unnecessary and improper. See Ohio Rev. Code § 1.01.

Prior to the Ohio Supreme Court's decision in the instant case, one Ohio Court of Appeals had held that

§ 1707.29 does not create a presumption. See *State v. Walsh*, 66 Ohio App.2d 85, 94, 420 N.E.2d 1013, 1020 (Franklin 1979). The Supreme Court reached the same conclusion, holding in the instant case that § 1707.29 merely sets forth what the term "knowledge" encompasses for purposes of criminal liability. See *State v. Warner*, 55 Ohio St.3d at 57, 564 N.E.2d at 42. This interpretation is entitled to deference. See *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991).

Giving due deference to the Ohio Supreme Court's reading of Ohio Rev. Code § 1707.29 – a reading that is by no means an obvious subterfuge for evading the Constitution – we conclude that § 1707.29 is nothing more than a definitional provision setting forth Ohio's standard of reasonable diligence for securities fraud cases. The instruction given by the trial court on the basis of the statute was thus entirely proper.

The judgment of the district court is AFFIRMED.

NATHANIEL R. JONES, Circuit Judge, concurring in part and dissenting in part.

Even in a case as heavily ladened with community emotion as this one, my sworn judicial duty to accord equal rights to the rich as well as the poor remains. Residing within that obligation is the commandment to be vigilant to ensure that the constitutional rights of this defendant have not wittingly or unwittingly, directly or indirectly, been transgressed.

I am strongly persuaded that a constitutional transgression has occurred here. Therefore, I dissent from that part of the majority opinion.

It is quite clear to me that the Ohio Supreme Court's *post facto* pronouncement that wire transfers are covered under Section 1153.01 of the Ohio Revised Code Annotated (Baldwin 1988),[1] transgressed the constitutional right of Warner to be provided with fair warning that his actions were criminal. Moreover, the retroactive application of the statute, as was done here, I am convinced, also deprives the defendant of his constitutional right to be fairly warned.

Fundamental to our concept of constitutional liberty is the unwavering ideal that a person has the immutable right to fair warning of the conduct which will permit the imposition of criminal sanctions. *Marks v. United States*, 430 U.S. 188, 191 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)). "[T]hat right is protected against judicial action by the Due Process Clause." *Marks*, 430 U.S. at 192. In this context, the Supreme Court has stated:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I,

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[1] Section 1153.01 provides:

No president, director, trustee, committee member, secretary, treasurer, attorney, or other officer or agent of a building and loan association shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association; nor shall he issue or put into circulation a warrant or other order, or assign, transfer, cancel, or deliver a note, bond, draft, mortgage, judgment, decree, or other written instrument belonging to the association, or raise or receive money for and in the name of such association, unless authorized to do so by its board of directors.

> § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one "that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action," or "that *aggravates* a *crime*, or makes it *greater* than it was, when committed." If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures.

Bouie, 378 U.S. at 353-54 (emphasis in original) (citations omitted).

I.

Warner moved for a judgment of acquittal after the jury returned its verdicts finding him guilty on six counts of unauthorized acts, in violation of Section 1153.01. He insisted that the wire transfers of funds from Home State to ESM, which were electronic transfers accomplished by computer impulse via the Federal Reserve Board's wire transfer system, did not constitute the assignment, transfer or delivery of a note, bond, draft or other written instrument as was charged in the indictment. The state responded, arguing that the wire transfers were the functional equivalent of a check or draft. Alternatively, the state, after being allowed to amend Warner's indictment post-trial to fit its alternative argument, contended that a

wire transfer is an order. The trial court denied Warner's motion for judgment of acquittal.

Upon review, the Ohio Court of Appeals found Warner's argument to be meritorious. *State v. Warner*, No. C-870222, 1989 WL 136396, at 25 (Ohio Ct. App. Nov. 15, 1989), *rev'd*, 55 Ohio St.3d 31, 564 N.E.2d 18 (Ohio 1990), *cert. denied*, 111 S. Ct. 1584 (1991). The court found that the state's belated attempt to amend the indictment was improper. Therefore, the court confined its "consideration to the question of whether a wire transfer constitutes an 'assign[ment], transfer or deliver[y] of a note, bond, draft or other written instrument.' " *Id.* at 23.

Referencing civil cases from other jurisdictions, the court concluded that there is compelling authority for finding either that wire transfers are the functional equivalent of a check or that the "construction of the term 'draft,' as it is used in R.C. 1153.01, to encompass funds conveyed by computer impulse would amount to judicial legislation by extending the language of the applicable provision beyond the intent of the legislature." *Id.* Relying on rules of statutory construction and focusing on the compelling authority favoring Warner's view, the court held that the relevant statutory phrase required that the violative instrument be in writing. Because the wire transfers were effectuated by computer impulse rather than by written instrument, the state appeals court concluded that there was insufficient evidence to convict Warner of the charges in the indictment.

The Ohio Supreme Court reversed. *Warner*, 564 N.E.2d 18. The court noted that wire transfers are commonplace and that there is a body of law which treats

wire transfers as a writing and/or as "the equivalent of sending a check or issuing a draft." *Id.* at 47. The court found that the rule of *ejusdem generis*[2] should not be invoked to defeat the obvious purpose of a legislative enactment. The court concluded:

> Through R.C. 1153.01, the General Assembly clearly intended to criminalize the unauthorized transfers of an association's assets regardless of form. Thus, the transfer of funds through the Fedwire system qualifies as a "draft" or other "written instrument" as those terms are used in R.C. 1153.01. Accordingly, the court of appeals' conclusion that the unauthorized transfer of Home State's assets over the Fedwire did not constitute a "writing" within the meaning of R.C. 1153.01 was erroneous.

Id.

II.

"Our system of justice is based on the principle that criminal statutes shall be couched in language sufficiently clear to apprise people of the precise conduct that is prohibited." *United States v. Alpers*, 338 U.S. 680, 685 (1950) (Black, J., dissenting); *see also Harriss*, 347 U.S. at 617 ("The constitutional requirement of definiteness is

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[2] The rule of *ejusdem generis* is a canon of statutory construction which limits general terms which follow specific ones to matters similar to those specified. *See United States v. Alpers*, 338 U.S. 680, 682-83 (1950) (quoting *Gooch v. United States*, 297 U.S. 124, 128 (1936)); *United States v. Jeter*, 775 F.2d 670, 676 n.4 (6th Cir. 1985) (quoting *Black's Law Dictionary* 464 (5th ed. 1979)), *cert. denied*, 475 U.S. 1142 (1986).

violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.") (footnote omitted).

As a result, criminal statutes are strictly construed. *See, e.g., Alpers*, 338 U.S. at 681; *United States v. Jeter*, 775 F.2d 670, 676 (6th Cir. 1985) (quoting *United States v. Essex*, 407 F.2d 214, 218 (6th Cir. 1969)), *cert. denied*, 475 U.S. 1142 (1986); *United States v. Waechter*, 771 F.2d 974, 978 (6th Cir. 1985). "This means that no offense may be created except by the words of [the legislature] used in their usual and ordinary sense. There are no constructive offenses." *Alpers*, 338 U.S. at 681. I recognize, however, that " '[t]he canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.' " *United States v. Moore*, 423 U.S. 122, 145 (1975) (quoting *United States v. Brown*, 333 U.S. 18, 25-26 (1948)).

The present language of Section 1153.01 does not disclose that wire transfers are included in the term "draft" or the phrase "other written instrument." As a result, it seems to me unforeseeable that the statute

would be construed in the manner that it was by the Ohio Supreme Court.[3]

My reading of Section 1153.01 leads me to the conclusion that it is a narrow and precise statute that plainly and clearly indicates that the lawmakers intended to criminalize *written* transfers of funds, be it through drafts or other written instruments. This conclusion results from the usual and ordinary usage of the words "draft" and "other written instrument," as used in this context.

The term "draft" connotes something written. While the majority implies that a "draft" could mean something other than a written document, the ordinary usage of the term, as used in this context, refers to a written document. A "draft," as defined by *Black's Law Dictionary* 258 (5th ed. abr. 1983), is "[a] *written* order by the first party, called the drawer, instructing a second party, called the drawee (such as a bank), to pay a third party, called the payee." (Emphasis added.) See also Ohio Rev. Code Ann. § 1303.03 (Baldwin 1988) (as used in a chapter of its Commercial Transactions statutes, a "draft" is a *writing*

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[3] I do not suggest that a court of a state is prevented from construing its own statutory laws. The Ohio Supreme Court certainly has that right. Moreover, we are bound by that state court's interpretation. *See, e.g., Lovely v. Cunningham*, 796 F.2d 1, 5 n.4 (1st Cir. 1986); *Gilbert v. Parke*, 763 F.2d 821, 826 (6th Cir. 1985). However, while the Ohio Supreme Court could, as is its right, construe Section 1153.01 to include wire transfers, it cannot apply that construction to Warner if that construction was so unforeseeable as to deprive Warner of the fair warning to which the Due Process Clause of the Constitution entitles him. *See Bouie*, 378 U.S. at 353-54, 362.

which complies with the requirements of being a negotiable instrument). The majority acknowledges that the fundamental nature of a draft includes it being written by stating that "[t]he most common example of a draft is an ordinary bank check, of course, and in the experience of most of us – if not in the experience of sophisticated businessmen – *bank drafts are always written instruments.*" *Warner v. Zent*, F.2d, (6th Cir. 1993) (emphasis added).[4]

Given the plain, restrictive statutory language, a person transferring funds by wire or computer impulse (or perhaps orally) would not have been able to foresee that his/her act was criminal *prior* to the ruling by Ohio's highest court. This unforeseeability is magnified in this type of case because the statute, on its face, is narrow and precise as opposed to merely being vague. Rather than using general, more expansive and inclusive terms, the statute sets out specific types of written instruments which, if used in an unauthorized manner, would violate it. As the Supreme Court discussed when confronted with a narrow and precise statute that a state supreme court judicially expanded:

> When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no

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[4] Obviously, the phrase "other written instrument" refers to a written instrument.

> reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," . . . or to "guess at [the statute's] meaning and differ as to its application," . . . the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

Bouie, 378 U.S. at 352.

Furthermore, when a statute is clear on its face, a citizen – whether a sophisticated businessman or not – should not have to canvass its legislative history and/or judicial pronouncements to determine whether his/her conduct is condemned. *Cf. McSherry v. Block*, 880 F.2d 1049, 1061 (9th Cir. 1989) (Canby, J., dissenting) (When the words of the statute are clear, "[c]itizens should not be required, on pain of criminal conviction, to explore legislative and judicial history to determine whether that history condemns their conduct even though the statute itself does not."), *cert. denied*, 111 S. Ct. 1404 (1991); *accord Dunn v. United States*, 442 U.S. 100, 112-13 (1979) (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)) ("[T]o ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not ' "plainly and unmistakably" ' proscribed."). Because the language of Section 1153.01 is so clear, Warner, in my view, was not given fair warning that his actions would

be deemed to violate Section 1153.01. We cannot hold the defendant – under this criminal statute – to a higher or lesser standard than any other citizen. As the first Justice John Marshall Harlan wrote in 1896 in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled* by *Brown v. Board of Educ.*, 347 U.S. 483 (1954), in a different context, the constitution does not distinguish between citizens on the basis of caste or class.

Even if it could be contended that there is some uncertainty about what Section 1153.01 states, with the assistance of general principles of statutory construction, it is clear to me that Section 1153.01 only referred to written instruments prior to the Ohio Supreme Court's pronouncement in Warner's case.

Through the principle of *noscitur a sociis*[5], Section 1153.01 can be construed to apply to only written instruments. As the Ohio Court of Appeals found, "with respect to the provision of the unauthorized acts portion of R.C. 1153.03[sic] under which Warner was charged[,][ ] the legislature's use of the catch-all phrase 'other written instruments' imposed upon the other instruments within the category, i.e., a 'note,' 'bond' or 'draft,' a requirement that they be in writing." *Warner*, 1989 WL 136396, at 24. Even the majority concedes that "[t]he authors of Ohio Rev. Code § 1153.01 *undoubtedly assumed* that any check or

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[5] The principle of *noscitur a sociis* (one may be known by the company that one keeps), "acknowledges that general and specific words are associated with and take color from each other, restricting general words to a sense analogous less general." *Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084, 1092 (6th Cir. 1981).

draft transferred or delivered in violation of the statute would be a written instrument, for otherwise they would not have used the words 'other written instrument' in the catch-all phrase at the end of the laundry list that includes the word 'draft.' " Warner, 997 F.2d at 127 (emphasis added). Assumptions are inappropriate elements of criminal statutory construction.

Furthermore, according to another general rule of statutory construction, *expressio unius est exclusio alterius*, the specific mention of one thing in a statute implies an intent on the part of the legislature to exclude another. *See, e.g., United States v. Silverman*, 976 F.2d 1502, 1522 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1595 (1993); *McCammon v. Indiana Dep't of Fin. Insts.*, 973 F.2d 1348, 1350 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1282 (1993). Pursuant to that rule, the specific mention of the terms "draft" and "other written instrument" implies an intent on the part of the lawmakers to exclude other modes of transfers like wire or computer transfers. As the Ohio Court of Appeals stated: "The failure of the legislature specifically to proscribe unauthorized transfers of funds by computer impulse might imply an intent on their part to exclude such transfers; however, it might also suggest that the present ubiquity of transfers by computer impulse was not within the contemplation of the legislature when the statute was enacted." *Warner*, 1989 WL 136396, at 24.

Notwithstanding the plain import of Section 1153.01, the majority seems to imply that because wire transfers have become commonplace, a person in the position of Warner reasonably could be expected to know that wire transfers would be treated as the equivalent as checks and drafts, and as a result, the wire transfers Warner

made would also violate Section 1153.01. While it is true that wire transfers have become commonplace, I am uncertain where that fact leads me. One could argue that such common usage should have prompted the Ohio Legislature to include same by amending the statute. Certainly the majority cannot be arguing that the mere frequent use of wire transfers, in and of itself, make it foreseeable that those transfers would be deemed illegal. It seems illogical to me to conclude that merely because wire transfers are commonplace, a broader interpretation of "draft" could be foreseeable or that a more narrow reading of the term would defeat the purpose of the legislature rather than promote it.

In addition, while wire transfers are widespread, the law governing those type of transfers was and is anything but clear. Certainly, in the civil context, there is some authority for the proposition that a transfer of funds by computer impulse may be held to be the functional equivalent of a check. *See Warner*, 564 N.E.2d at 45-47 (authorities noted). As the Ohio Court of Appeals noted, however, "[t]here exists . . . equally compelling authority for Warner's position that construction of the term 'draft,' as it is used in R.C. 1153.01, to encompass funds conveyed by computer impulse would amount to judicial legislation by extending the language of the applicable provision beyond the intent of the legislature." *Warner*, 1989 WL 136396, at 23 (authorities noted). Many courts have decided that wire/electronic transfers were not in the contemplation of the drafters of Article 4 of the Uniform Commercial Code ("U.C.C.") and have determined that the U.C.C. does not and should not deal with those type of transfers. *See id.; Evra Corp. v. Swiss Bank*

Corp., 673 F.2d 951, 955 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982); *Shawmut Worcester County Bank v. First Am. Bank & Trust*, 731 F. Supp. 57, 62 (D. Mass. 1990); *Mellon Bank v. Securities Settlement Corp.*, 710 F. Supp. 991, 993 (D.N.J. 1989). Arguably, the same could have been true with the Ohio legislature's thinking in formulating Section 1153.01.

Furthermore, by quoting from the Official Code Comment to U.C.C. § 4A-102 (Anderson Supp. 1992),[6] the Ohio Supreme Court recognized the need for further legislation to deal with the current banking practices in the civil context. It stated: "We recommend that the General Assembly consider legislation such as UCC 4A-102 in light of today's modern banking environment and in order to avoid sometimes strained interpretations of Ohio

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[6] The Official Code Comment to U.C.C. § 4A-102 reads, in pertinent part:

> The funds transfer governed by Article 4A is in large part a product of recent and developing technological changes. Before this Article was drafted there was no comprehensive body of law – statutory or judicial – that defined the juridical nature of a funds transfer or the rights and obligations flowing from payment orders. Judicial authority with respect to funds transfers is sparse, undeveloped and not uniform. Judges have had to resolve disputes by referring to general principles of common law or equity, or they have sought guidance in statutes such as Article 4 which are applicable to other payment methods. But attempts to define rights and obligations in funds transfers by general principles or by analogy to rights and obligations in negotiable instrument law or the law of check collection have not been satisfactory.

UCC Article IV." *Warner*, 564 N.E.2d at 47 n.21. The same recognition that modern banking practices, including wire transfers, require further explicit legislation would seem to hold true in the criminal context, if not more so, given the loss of personal liberty aspect of criminal justice. In any event, this Court's majority ought not – and I shall not – countenance a construction of a statute that amounts to engrafting an amendment upon it. Only by such an amendment can this conviction under Section 1153.01 be held to not violate the defendant's constitutional right.

Finally, nothing has prevented the Ohio legislature from proscribing, by amendment, that activity directly and explicitly. In fact, the common nature of this type of transfer is all the more reason to expect the legislature to act explicitly. Although due process does not require impossible standards of clarity, further precision, given the commonplace nature of wire transfers, is neither impossible nor impractical. *Cf. Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (Court found statute to be unconstitutionally vague on its face within the meaning of the due process clause because it did not clarify certain terms).

III.

Given that Section 1153.01 is clear and precise, that such a statute is juxtaposed against rapidly evolving banking practices, and that citizens should not have to rely on clear criminal statutes at the risk of their own personal peril, I must part company with the majority in its conclusion that Warner had fair warning that his actions violated Section 1153.01. While I dissent from Section II.B. of the majority opinion, I do, however, concur in the rest of it.

No. 92-4339

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARVIN L. WARNER, Petitioner-Appellant,	)	ORDER
v.	)	
REX A. ZENT, WARDEN, Respondent-Appellee.	)	

BEFORE: JONES, GUY, and NELSON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Jones would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

Ohio Revised Code § 1153.01:

No president, director, trustee, committee member, secretary, treasurer, attorney, or other officer or agent of a building and loan association shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association; nor shall he issue or put into circulation a warrant or other order, or assign, transfer, cancel, or deliver a note, bond, draft, mortgage, judgment, decree, or other written instrument belonging to the association, or raise or receive money for and in the name of such association, unless authorized to do so by its board of directors.

Ohio Revised Code § 1707.29:

In any prosecution brought under sections 1707.01 to 1707.45 of the Revised Code . . . the accused shall be deemed to have had knowledge of any matter of fact, where in the exercise of reasonable diligence, he should prior to the alleged commission of the offense in question, have secured such knowledge.

Ohio Revised Code § 1707.44(B)(4):

No person shall knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for . . . the . . . purpose[] [of] . . . selling any securities in this state.

Ohio Revised Code § 1707.44(J):

No person, with purpose to deceive, shall make, issue, publish, or cause to be made, issued, or published any statement or advertisement as to the value of securities, or as to alleged facts

affecting the value of securities, or as to the financial condition of any issuer of securities, when such person knows that such statement or advertisement is false in any material respect.

Ohio Revised Code § 1707.44(G):

No person in selling securities shall knowingly engage in any act or practice which is, in sections 1707.01 to 1707.45 of the Revised Code, declared illegal, defined as fraudulent, or prohibited.

Ohio Revised Code § 2901.21:

When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

Ohio Revised Code § 2901.22(B):

A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

Ohio Revised Code § 2901.22(C):

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be

of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

Ohio Rule of Evidence 606(b):

(b) *Inquiry into validity of verdict or indictment*. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes.